

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**



874

JOINT APPENDIX

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In the  
**UNITED STATES COURT OF APPEALS**  
For the District of Columbia Circuit

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No. 20,845

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L. B. WILSON, INC.,

*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee,*

CORAL TELEVISION CORPORATION,

*Intervenor.*

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**ON APPEAL FROM A MEMORANDUM OPINION AND  
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION**

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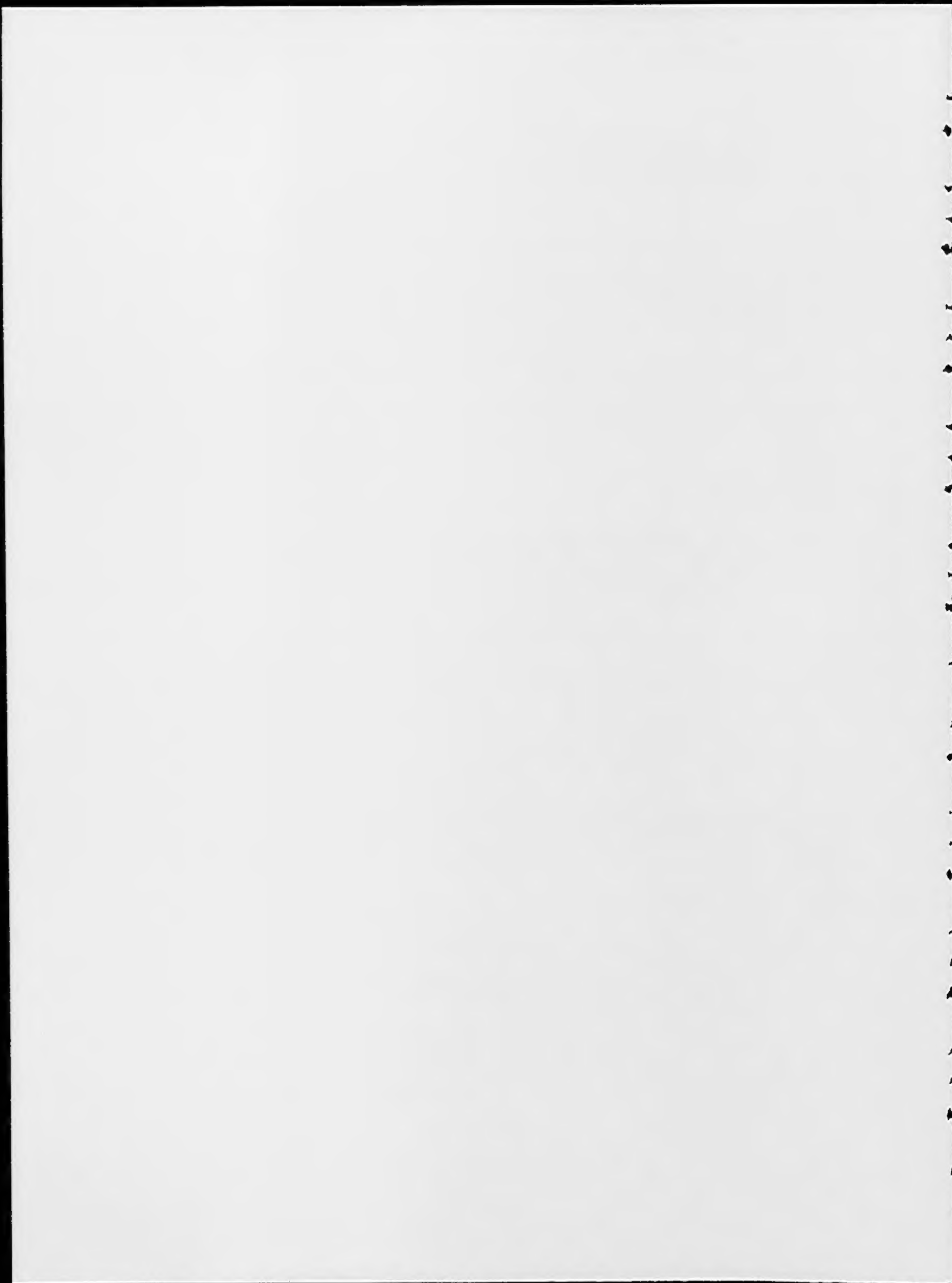
United States Court of Appeals  
for the District of Columbia Circuit

**FILED** SEP 20 1967

*Nathan J. Paulson*  
CLERK

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

L. B. WILSON, INC.,  
*Appellant,*

v.

FEDERAL COMMUNICATIONS  
COMMISSION  
*Appellee.*

No. 20845

PREHEARING STIPULATION

I. The undersigned parties, by their counsel, agree and stipulate that the following issues are presented by the Notice of Appeal in the above-entitled case.

1. Whether the Commission's findings and conclusions that no substantial and material questions of fact were raised by the petitioners to deny or the objector, and that grant of the Coral application without an evidentiary hearing would be consistent with the public interest, convenience and necessity, are supported by substantial evidence, are based upon an adequate record, and are not arbitrary or capricious.
- \*2. Whether the Commission acted in an arbitrary and capricious manner in finding that the facts alleged by petitioners were not adequate to warrant an evidentiary hearing on the alleged adverse impact that a grant of Coral's application would have on UHF development.
- \*3. Whether the Commission's finding without an evidentiary hearing that there has been no *de facto* transfer of control of Coral is supported by substantial evidence in the record and is not arbitrary or capricious.

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\*Intervenor believes that Issues 2 and 3 are encompassed in Issue 1.

4. Whether the Commission failed to give an adequate explanation of the reasons for its action.
5. Whether the Commission abused its discretion in granting a waiver of its Rules to permit Coral to move its transmitter to a short-spaced location.
6. Whether the Commission abused its discretion in finding that Coral was financially qualified to construct and operate its station as proposed.
7. Did appellant's Petition to Deny raise a substantial issue as to whether Coral may be relied upon to perform in accordance with its promises to construct and, if so, whether the Commission failed to dispose of that issue contrary to Section 309(d) of the Communications Act of 1934, as amended, and Section 1.591(c) of the Commission's Rules.
8. After finding that there had been a technical transfer of *de jure* control, but not *de facto* control, of Coral, did the Commission abuse its discretion in permitting Coral to file an FCC shortform 316 to cover the transfer.

II. The undersigned by stipulating and agreeing to these issues do not concede the correctness of any factual or legal premises which may be implicit in the formulation of the issues.

III. The counsel for the parties further stipulate and agree that the Joint Appendix will be filed ten (10) days after filing of the reply brief and, if no reply brief is filed, fifteen (15) days after the filing of the Appellee's brief. References to the record appearing in the briefs of the parties will be to the page numbers of the record as certified to the Court. In the printing of the Joint Appendix there will be set forth, in addition to the consecutive numbering of the Joint Appendix, the original record page numbers in bold type and indented in a manner



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which will render it convenient for the Court to locate the pages referred to in the brief.

Respectfully submitted,

John H. Conlin,  
Associate General Counsel,  
Federal Communications  
Commission  
Counsel for Appellee

Peter L. Koff, Esquire  
1822 Jefferson Place, N.W.  
Washington, D.C. 20036  
Counsel for Appellant

Peter D. O'Connell, Esquire  
Pierson, Ball & Dowd  
1000 Ring Building  
Washington, D.C. 20036  
Counsel for Intervenor

April 14, 1967

JA 4

[1]

PIERSON, BALL & DOWD  
1000 Ring Building  
Washington, D.C. 20036

March 15, 1966

Mr. Ben F. Waple, Secretary  
Federal Communications Commission  
Washington, D.C. 20053

Dear Mr. Waple:

On behalf of Coral Television Corporation there is transmitted herewith, in triplicate, an application for modification of construction permit of WCIX-TV, South Miami, Florida.

The application seeks authority to change antenna location and to change station location from South Miami, Florida, to Miami, Florida. The proposed site is located slightly under the minimum mileage separation from Station WDBO-TV, Orlando, Florida. Accordingly, a petition for a waiver of Section 73.610 of the Rules is being filed simultaneously with this application.

A check in the amount of \$100 to cover the filing fee of \$100 is attached.

Should there be any question concerning this application, please communicate with this office.

Very truly yours,

PIERSON, BALL & DOWD

/s/ Quayle B. Smith

Encls.

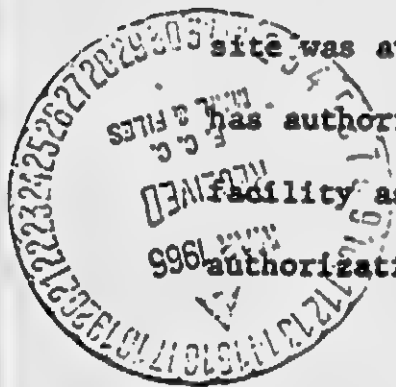
## EXHIBIT NO. 1

The Commission by Memorandum Opinion and Order released February 21, 1958, in Docket No. 11758, added Channel 6 as the fourth VHF channel to Miami. The Commission at that time contemplated that the new channel would be competitive to the existing Miami television stations. In so doing, the Commission stated:

"...there is no doubt in our minds that the assignment of an additional VHF channel to Miami is necessary to provide greater opportunities for television growth and for comparable and effective competition among stations in the area so as to insure more than better television to the public." (15 RR 1642a, 1642c)

At the time of Commission action in this matter, it was recognized that problems existed in the Miami area as concerned the location of a Channel 6 facility which would meet technical requirements of the Rules and also permit adequate coverage to Miami. Specifically, the Commission stated that at some future time it might be necessary in an appropriate adjudicatory proceeding to determine, in the light of the specific proposal, whether the proposal could be granted, notwithstanding some deviation from the Commission's technical standards.

The Commission has been fully aware of the problems in locating a suitable antenna structure for Channel 6, which would permit optimum service contemplated by the assignment of that channel to Miami and still conform to standards laid down by the FAA for a suitable structure which would not present an aerial navigation problem. Because no suitable site was available which would meet the duo-fold problem, the Commission has authorized WCIX-TV as a South Miami facility rather than as a Miami facility as had been contemplated by the Commission. The original authorization to WCIX-TV, which was subsequently modified to increase



antenna height, would have permitted city-grade service to only about 20% of the Miami land area.

Until recently, WCIX-TV has had little or no encouragement in seeking permission to construct a tower on the mainland which would permit the maximum utilization of the channel. However, the FAA has indicated its interests in approving the location of television towers in the general area south of Miami where WCIX-TV proposes to locate by this application.

On February 16, 1966, the FAA conducted an informal Airspace Meeting on the WCIX-TV proposal to construct a 1049' tower in the Homestead, Florida area. The proposal is now under consideration by the FAA. The applicant believes that formal approval of its proposal will be granted in the near future.

Operating from the proposed site WCIX-TV will provide City-Grade service to virtually all of the City of Miami, thereby qualifying WCIX-TV as the fourth VHF outlet in Miami as the Commission had contemplated at the time Channel 6 was assigned to Miami. Accordingly, the instant proposal is consonant with the Commission's objectives announced in Docket No. 11758.

On February 2, 1966, WCIX-TV filed with the Commission an application to designate its main studio at 5220 Biscayne Boulevard, Miami, Florida. As pointed out in that application, the available studio space at the location specified would be more adequate than available studio space in South Miami. Subsequently, even better studio space has been located and arrangements made for leasing the space. The new location is



located in downtown Miami and will be readily accessible from the entire Miami area.

In an application (BMPCT-6178) filed on October 29, 1965, (granted December 17, 1965) the permittee submitted extensive information on studies conducted by and for WCIX-TV in connection with determining attitudes and opinions of South Floridians toward their selection of what they would enjoy viewing on WCIX-TV. This study was carried out in the area where WCIX-TV will provide coverage (Grade B or better). The study (which points up the homogeneity of viewers' preferences throughout the area) formed the basis for a program proposal designed to meet the needs of all of the area. This proposal will not be affected by the location of the main studios in Miami instead of South Miami. Accordingly, there is no change in the programming proposal of WCIX-TV.

WCIX-TV will make extensive use of mobile equipment for land and sea to cover every possible news event and other program features throughout the area (See BMPCT-6178). With such a high degree of mobility, WCIX-TV will be able to take care of all the area's program needs without particular regard to the location of fixed studios.

In view of the fact that Channel 6 was assigned to Miami in order to provide effective competition among stations in the area, this end will be better achieved by the relocation of the facility to Miami. There is no offsetting loss to the public whatsoever.

WCIX-TV is eager to proceed with the construction of its facilities and will do so immediately upon Commission action on this application.

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ENGINEERING REPORT

SILLIMAN, MOFFET & KOWALSKI  
CONSULTING RADIO ENGINEERS

1408 G STREET, N.W.

WASHINGTON, D. C. 20005

WCIX-TV

I ABSTRACT

THIS ENGINEERING EXHIBIT HAS BEEN PREPARED ON BEHALF OF CORAL TELEVISION CORPORATION, PERMITTEE OF TV STATION WCIX-TV AT SOUTH MIAMI, FLORIDA, IN SUPPORT OF ITS APPLICATION TO MOVE TO MIAMI, FLORIDA WITH ITS TRANSMITTER LOCATED NEAR PRINCETON, FLORIDA. IT IS ALSO PROPOSED TO DECREASE EFFECTIVE RADIATED POWER AND INCREASE ANTENNA HEIGHT TO PROVIDE THE NECESSARY COVERAGE OF MIAMI.

SOME OF THE FIGURES CONTAINED HEREIN WERE PREPARED BY OR UNDER DIRECTION OF MR. WILLIAM E. BENNS III OF JOHN H. MULLANEY AND ASSOCIATES. ALL SUCH FIGURES ARE IDENTIFIED ON THE TITLE PLAQUES. MR. BENNS' AFFIDAVIT ATTESTING TO THE PREPARATION IS ATTACHED HERETO.

ALL OTHER FIGURES ATTACHED OR ON WHICH THIS EXHIBIT IS BASED WERE PREPARED BY OR UNDER THE DIRECT SUPERVISION OF ROBERT M. SILLIMAN, WHOSE AFFIDAVIT IS ATTACHED.

II ALLOCATION CONSIDERATIONS

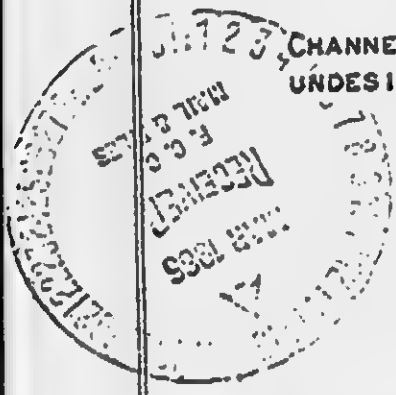
A. CO-CHANNEL SPACING

THE SITE PROPOSED HEREIN IS LESS THAN THE 220 MILES REQUIRED BY THE FCC RULES FOR CO-CHANNEL STATIONS IN ZONE III. THE STATION TO WHICH IT IS SHORT SPACED IS WDBO-TV AT ORLANDO, FLORIDA. HOWEVER, AERONAUTICAL CONSIDERATIONS DICTATE THAT THE SITE PROPOSED IS AS FAR FROM WDBO-TV AS POSSIBLE FOR A TOWER OF THE HEIGHT REQUESTED.

THE SEPARATION FROM THE PROPOSED SITE TO WDBO-TV COMPUTED IN ACCORDANCE WITH THE FCC RULES IS 215.6 MILES.

THEREFORE, IT IS NECESSARY TO PROVIDE EQUIVALENT PROTECTION TO WDBO-TV IN THE MANNER DESCRIBED IN "SUPPLEMENT TO REPORT AND ORDER" TO DOCKET NO. 13340 DATED OCTOBER 4, 1961.

WDBO-TV OPERATES ON CHANNEL 6(-) AND WCIX-TV IS AUTHORIZED CHANNEL 6 (0); THEREFORE, THE RATIO OF F(50,50) DESIRED TO F(50,10) UNDESIRABLE SIGNAL WHICH IS APPLICABLE IN THIS INSTANCE IS 28 DB.



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WCIX-TV

## II ALLOCATION CONSIDERATIONS

### A. Co-CHANNEL SPACING (CONT'D)

SMK FIGURE 1 HEREIN IS A DIAGRAM WHICH SHOWS THE ASSUMED 220 MILE MINIMUM STANDARD SPACED SITE AND THE INSTANT PROPOSED SITE AS UTILIZED TO DETERMINE THE EQUIVALENT PROTECTION REQUIREMENTS AND MAXIMUM ALLOWABLE RADIATION VALUES TOWARD WDBO-TV.

IT CAN BE SEEN FROM THIS FIGURE THAT THE MAXIMUM ALLOWABLE RADIATION TOWARD WDBO-TV VARIES FROM 19.0 DBK TO 19.35 DBK THROUGH AN ARC OF  $46.8^\circ$  FROM N  $321.4^\circ$  E THROUGH N  $8.2^\circ$  E. DUE TO THE SLIGHT DIRECTIONAL CHARACTERISTICS OF ALL GE BATWING TYPE ANTENNAS, IT IS POSSIBLE AND QUITE FEASIBLE TO PROVIDE THE NECESSARY PROTECTION OF WDBO-TV BY CAREFUL ORIENTATION OF THE ANTENNA PROPOSED WITHOUT THE NECESSITY FOR A SPECIALLY DESIGNED DIRECTIONAL ANTENNA.

IT IS PROPOSED HEREIN TO PROVIDE THE PROTECTION TO WDBO-TV IN THIS MANNER. THE GENERAL ELECTRIC CO. WILL PROVIDE ORIENTATION INSTRUCTIONS WITH DELIVERY OF THE ANTENNA AND A CIVIL ENGINEER WILL BE RETAINED TO INSURE THE INSTALLATION IN THE MANNER SPECIFIED BY G.E.

SMK FIGURE 2-A IS A HORIZONTAL RADIATION PATTERN SHOWING THE RADIATION WITH THE PROPOSED POWER INPUT. THE PATTERN IS PROPERLY ORIENTED TO PROVIDE EQUIVALENT PROTECTION TO WDBO-TV. SMK FIGURE 2-B IS THE RELATIVE FIELD PATTERN OF A STANDARD TYPE TY-60-P ANTENNA AS MEASURED BY G.E. USING A FULL SIZE PRODUCTION ANTENNA.

SMK FIGURE 2-C IS A DESCRIPTION SHEET (FCC FILING DATA) OF THE ANTENNA PROPOSED HEREIN.

SMK FIGURE 2-D IS A LETTER FROM THE GENERAL ELECTRIC CO. WITH REGARD TO THE PATTERN SHOWN AS FIGURE 2-C AND PROPOSING AN ANTENNA WITH THIS PATTERN CHARACTERISTIC FOR WCIX-TV.

### B. CITY COVERAGE

THIS APPLICATION PROPOSES TO CHANGE FROM SOUTH MIAMI TO MIAMI. THE PROPOSED SITE IS LOCATED 28.5 MILES FROM THE FURTHEST POINT OF LAND IN THE CITY OF MIAMI. DUE TO THE SLIGHT DIRECTIONAL CHARACTERISTIC AND THE NECESSARY ORIENTATION OF THE PROPOSED ANTENNA, THE DISTANCE TO THE 74 DBU CONTOUR IN THE CRITICAL DIRECTION IS 28.2 MILES. THIS WILL PLACE 74 DBU (5 MV/M) OVER 99.89% OF THE LAND AREA OF THE CITY OF MIAMI, AND PLACES 73.93 DBU (4.97 MV/M) OVER THE ENTIRE LAND AREA IN THE CITY. IT IS THE WRITER'S OPINION THAT COVERAGE OF THIS MAGNITUDE CONSTITUTES VERY SUBSTANTIAL COMPLIANCE WITH FCC RULE 73.685 AND THAT THIS IS THE BEST COVERAGE OBTAINABLE FROM THE PROPOSED SITE.

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WCIX-TV

## II ALLOCATION CONSIDERATIONS

### B. CITY COVERAGE (CONT'D)

SMK FIGURE 3 HEREIN IS A PORTION OF A MIAMI LOCAL AERO CHART WHICH SHOWS THE PROPOSED CITY COVERAGE CONTOUR AND THE CITY LIMITS OF MIAMI.

SMK FIGURE 4 IS A MAP SHOWING THE CITY COVERAGE CONTOUR AND THE GRADE "A" AND GRADE "B" SERVICE CONTOURS.

### C. WAIVER OF PORTION OF FCC RULES

PARAGRAPH 73.610 REQUIRES THAT CO-CHANNEL TV STATIONS OPERATING IN ZONE III ON ONE OF THE VHF CHANNELS BE SEPARATED BY NOT LESS THAN 220 MILES. IT IS REQUESTED THAT APPLICABLE PORTIONS OF SECTION 73.610 BE WAIVED AS THIS PROPOSAL WILL PROVIDE "EQUIVALENT PROTECTION" TO WDBO-TV AS DEFINED IN THE "SUPPLEMENT TO REPORT AND ORDER" TO DOCKET 13340 DATED OCTOBER 4, 1961.

## III FURTHER RESPONSE TO FCC FORM 301 SECTION V-C

PARAGRAPH 6: THE TRANSMITTERS WILL BE OPERATED INTO A CALIBRATED DUMMY LOAD AND THE REFLECTOMETER WILL BE CALIBRATED TO READ 100% FOR THE CORRECT OPERATING POWER.

PARAGRAPH 7: MULLANEY FIGURE 7 HEREIN IS A VERTICAL PLAN SKETCH OF THE PROPOSED ANTENNA SYSTEM.

PARAGRAPH 14: MULLANEY FIGURES 1 THROUGH 1-G ARE TOPOGRAPHIC MAPS SHOWING THE INFORMATION REQUIRED TO SATISFY THIS PARAGRAPH. MULLANEY FIGURES 2 THROUGH 2-H ARE PROFILE GRAPHS OF THE RADIALS REQUIRED TO PREDICT CONTOURS AND DETERMINE THE AVERAGE TERRAIN.

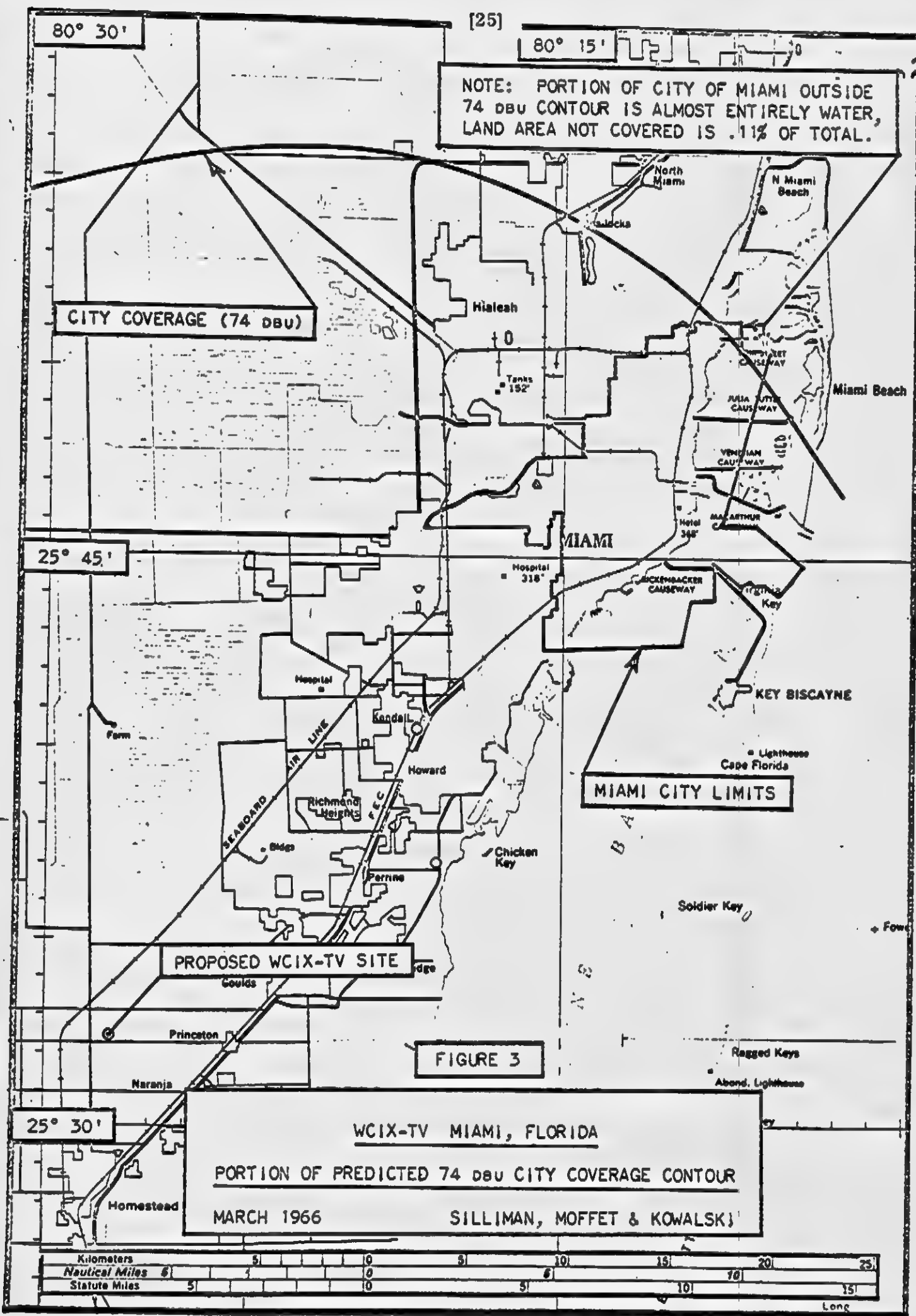
PARAGRAPH 15: THE FOLLOWING TABULATION SHOWS THE DATA NECESSARY TO DETERMINE THE LOCATION OF THE 74 DBU CITY COVERAGE CONTOUR AND THE DISTANCES TO THIS CONTOUR IN THE PERTINENT DIRECTIONS. DUE TO THE UNIFORM NATURE OF THE TERRAIN, THE ANTENNA HEIGHTS ABOVE AVERAGE TERRAIN FOR RADIALS OTHER THAN THE EIGHT STANDARD RADIALS SHOWN ON THE FORM WERE INTERPOLATED FROM THE DATA FOR THE STANDARD RADIALS. EFFECTIVE RADIATED POWER WAS TAKEN DIRECTLY FROM THE RADIATION PATTERN SHOWN AS SMK FIGURE 2-A.

JA 11

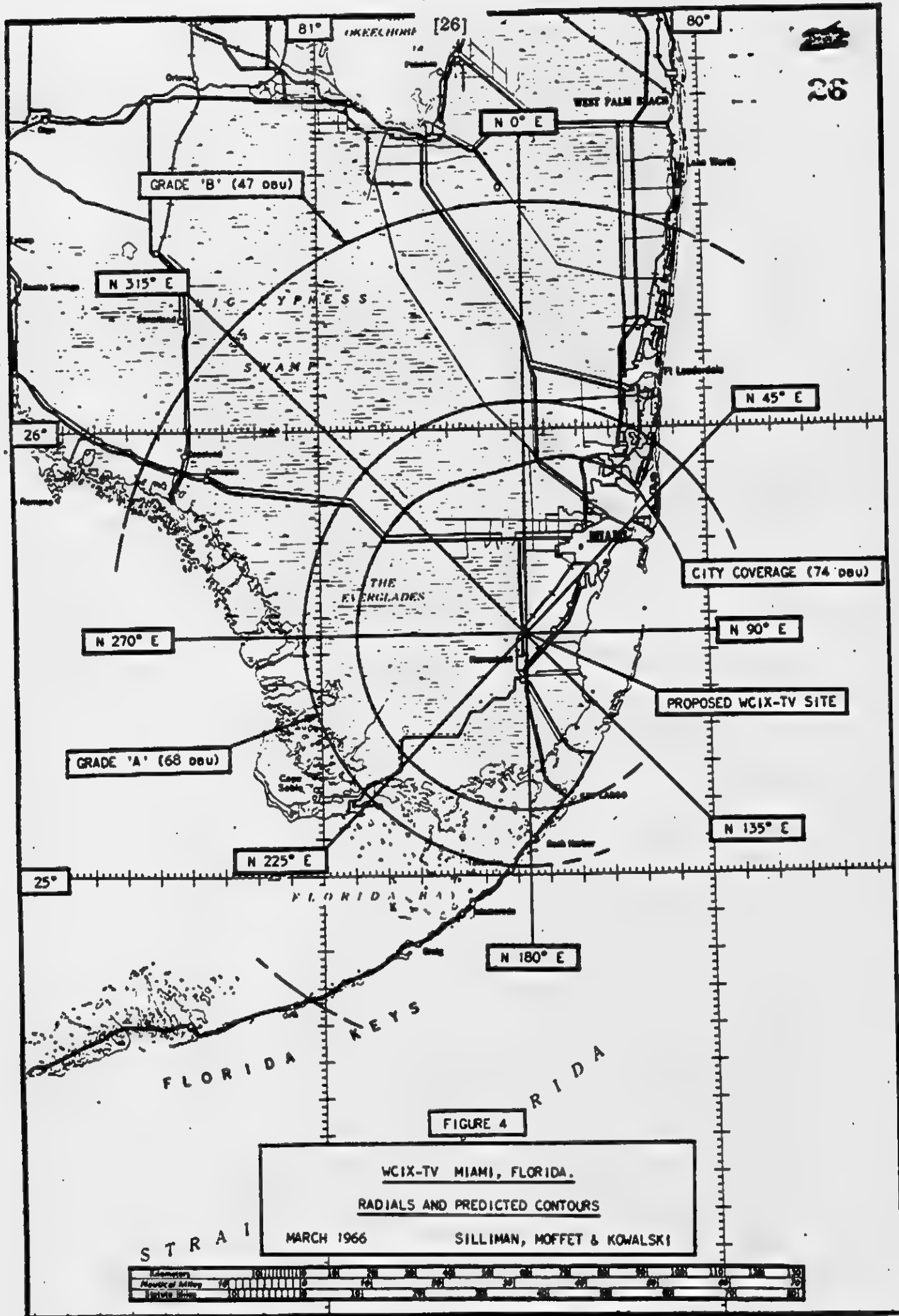
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25

NOTE: PORTION OF CITY OF MIAMI OUTSIDE 74 DBU CONTOUR IS ALMOST ENTIRELY WATER, LAND AREA NOT COVERED IS .11% OF TOTAL.



JA 12





Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

In re Application of:

CORAL TELEVISION CORPORATION  
WCIX-TV, South Miami, Florida

For Modification of Construction Permit

Before the Commission

File No. EMPCT-

PETITION FOR WAIVER

Coral Television Corporation, by its attorneys, respectfully submits this request for a waiver of Section 73.610 of the Commission's Rules to permit the location of WCIX-TV at a distance slightly less than 220 miles from co-channel Station WDBQ-TV, Orlando, Florida, but affording "equivalent protection" to WDBQ-TV. In support whereof the following is shown:

1. The Commission by Memorandum Opinion and Order released February 21, 1958, in Docket No. 11758, added Channel 6 as the fourth VHF channel to Miami. The Commission at that time contemplated that the new channel would be competitive to the existing Miami television stations.

In so doing, the Commission stated:

"...there is no doubt in our minds that the assignment of an additional VHF channel to Miami is necessary to provide greater opportunities for television growth and for comparable and effective competition among stations in the area so as to insure more than better television to the public." (15 RR 1642a, 1642c)



2. At the time of Commission action in this matter, it was recognized that problems existed in the Miami area as concerned the location of a Channel 6 facility which would meet technical requirements of the Rules and also permit adequate coverage to Miami. Specifically, the Commission stated that at some future time it might be necessary in an appropriate adjudicatory proceeding to determine, in the light of the specific proposal, whether the proposal could be granted, notwithstanding some deviation from the Commission's technical standards.

3. The Commission has been fully aware of the problems in locating a suitable antenna structure for Channel 6, which would permit optimum service contemplated by the assignment of that channel to Miami and still conform to standards laid down by the FAA for a suitable structure which would not present an aerial navigation problem. Because no suitable site was available which would meet the duo-fold problem, the Commission has authorized WCIX-TV as a South Miami facility rather than as a Miami facility as had been contemplated by the Commission. The original authorization to WCIX-TV, which was subsequently modified to increase antenna height, would have permitted city-grade service to only about 20% of the Miami land area. Attempts before the FAA to increase tower height so that adequate coverage of Miami could be achieved were rejected.

4. Until recently, WCIX-TV has had little or no encouragement in seeking permission to construct a tower on the mainland which would permit the maximum utilization of the channel. However, the FAA has indicated its interests in approving the location of television towers in an area south of Miami where WCIX-TV proposes to locate by an application for modification of construction permit submitted simultaneously



with this Petition. Operating with the facilities proposed, WCIX-TV would place a city-grade signal over 99.89% of the City of Miami. If WCIX-TV were to be moved southward to meet the 220 mile separation requirement, adequate coverage of Miami could not be realized.

5. On February 16, 1966, the FAA conducted an informal Airspace Meeting on the WCIX-TV proposal to construct a 1049' tower in the Homestead, Florida area. The proposal is now under consideration by the FAA. The applicant believes that formal approval of its proposal will be granted in the near future.

6. Operating from the proposed site WCIX-TV will provide city-grade service to virtually all 99.89% of the land area of the City of Miami, thereby qualifying WCIX-TV as the fourth VHF outlet in Miami as the Commission had contemplated at the time Channel 6 was assigned to Miami. Accordingly, the instant proposal is consonant with the Commission's objectives announced in Docket No. 11758.

7. The site proposed for WCIX-TV is at a distance of 215.6 miles from the authorized site of WDBO-TV or 4.4 miles short of the minimum separation required by Section 73.610. According to the engineering statement submitted with the application for modification of construction permit (incorporated herein by reference), the maximum allowable radiation towards WDBO-TV varies from 19.0 DBK to 19.35 DBK through an arc of 46.8° from N 321.4°E through N 8.2°E. Due to the slight directional characteristic of all GE Batwing-type antennas, it is possible and quite feasible to provide the necessary protection of WDBO-TV by careful orientation of the antenna proposed without the necessity for a specially designed directional antenna.

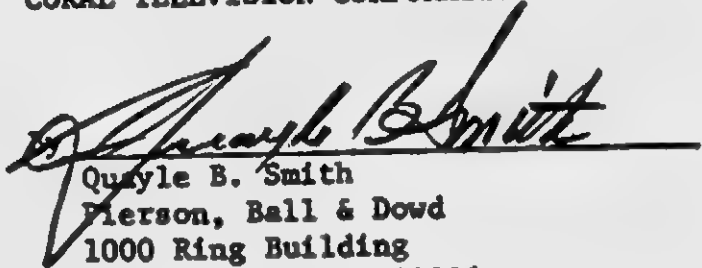
8. The characteristics of the proposed GE antenna are set out in the application for modification of permit. The horizontal radiation pattern of the antenna is based on measured full-scale data on a typical channel 6 antenna as recorded at General Electric's Cazenovia Test Site. GE will provide orientation instructions with delivery of the antenna and a civil engineer will be employed to insure the installation in the manner specified by GE.

9. The application for modification of construction permit proposes to change the location of WCIX-TV from South Miami to Miami. As stated above, this move is consonant with the Commission's objectives stated at the time Channel 6 was assigned to Miami. Operating as proposed WCIX-TV will place 74 DBU (5 mv/m) over 99.89% of the land area of the City of Miami and places 73.93 DBU (4.97 mv/m) over the entire land area in the City. It is submitted that coverage of this magnitude constitutes compliance with Section 73.685 of the Rules. However, should it be determined that a waiver of Section 73.685 is required, it is submitted that in view of the de minimis amount of area (0.11%) not receiving a 74 DBU signal, a waiver of the city-grade requirement should be granted.

WHEREFORE, the premises considered, the public interest will be served by the grant of a waiver of Section 73.610 of the Rules and, if necessary, a waiver of Section 73.685.

Respectfully submitted,

CORAL TELEVISION CORPORATION

  
Quayle B. Smith  
Pierson, Ball & Dowd  
1000 Ring Building  
Washington, D.C. 20036

Counsel for Coral Television Corporation

Before the  
Federal Communications Commission  
Washington, D. C.

In re Application of )

Coral Television Corporation )  
WCIX-TV, South Miami, Florida )

For Modification of Construction Permit )

Before the Commission: )

File No. BMPCT-6256

OFFICE OF THE SECRETARY  
F. C. C.

APR 29 1966

RECEIVED

PETITION TO DENY

L. B. Wilson, Incorporated (Wilson), by its attorneys, respectfully requests that the Commission deny or designate for hearing the application of Coral Television Corporation (Coral) for authority to modify its construction permit for WCIX-TV, South Miami, Florida, to change station location to Miami and make changes in transmitter and tower. The following is submitted in support of this request:

A. Standing

1. Wilson is licensee of Station WLBW-TV, operating on Channel 10 in Miami, Florida. As an operating television station, it competes for local, regional and national advertising revenues. Since the pending Coral application proposes to license station WCIX-TV to Miami for the first time, and since the applicant will increase the station's signal strength in Miami, it is apparent without extended discussion that

Wilson is a party in interest to this application. Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S. 470 (1940).

B. Preliminary Statement and Threshold Issues

2. It must be observed at the outset that this application raises an extraordinary number of questions concerning the public interest. After reviewing some of these questions, Wilson has determined that some may be stated very simply and that others will presumably be discussed in considerable detail by parties who will feel the impact of this proposal with more immediacy than Wilson (e.g. any party who even hopes to establish a UHF service in this area must oppose this application with desperate vigor on the basis of its impact upon UHF development). Wilson has therefore determined that in the dual interest of clarity and brevity, it will concentrate upon two issues: (1) The apparent unauthorized transfer of control of the permittee corporation, and (2) Coral's consistent failure to construct this station in accordance with its representations.

3. Before concentrating upon these two issues, however, Wilson considers it advisable to allude briefly to other major questions raised by this application, as a preliminary matter. Each of these matters, though stated with brevity in the following sub-paragraphs, is of sufficient import to require a hearing on the pending application:

[69]

a. The applicant has supplied the Commission with absolutely no information to establish its financial qualification to construct this station. There are no figures concerning cost of construction and there are no figures to show available resources. Coral's most recent balance sheet on file with the Commission is over 6 months old and is inadequate to show any qualification. There is not even any concession to the new Ultravision test. (See Ultravision Broadcasting Co., 5 RR 2d 343)

b. The adverse impact upon the development of UHF telecasting in Miami is painfully obvious. Coral's entire rationale respecting its proposed move is based upon a decision which is now over eight years old, and which did not even anticipate the bright hopes for UHF development which have been kindled by "all channel receiver legislation". A grant of Coral's application would kill these hopes in Miami. See, e.g. Triangle Publications, Inc., 3 RR 2d 37 (1964), Channel Assignment in Bloomington-Indianapolis, 5 RR 2d 1744 (1965), Louisiana Television Broadcasting Corp. v. FCC U.S. App. D. C. , 5 RR 2d 2024 (1965).

c. The derogation of minimum mileage separations which has been proposed requires a waiver which cannot be granted without good cause.

[70]

d. The applicant proposes to move in to Miami, but to continue to produce the programming which it had designed to serve South Miami. Despite the vastly different areas and populations to be served, it has made no new survey to determine the needs and interest of the new area. Suburban Broadcasters, 20 RR 951, affirmed sub nom. Henry v. Federal Communications Commission, 112 U.S. App. D. C. 257.

4. The failure of Coral's showing upon the above issues is so apparent as to require no further explanation. The remainder of this petition will, therefore, be devoted to two separate questions which require more detailed factual development.

C. The Commission should set the pending application for hearing to determine whether there has been an unauthorized transfer of control of Coral.

1. The Coral ownership report files show that de jure control of the permittee has been transferred from the original shareholders.

5. Since April 29, 1964, when the Commission granted Coral's application for a new television station, there have been numerous transactions in the corporation's stock. As will be shown in the following paragraphs, the effect of these transactions has been to transfer control of the corporation out of the hands of the 10 original shareholders.

6. The impact of these transactions is best demonstrated in tabular form. In the following table, each of the ten original shareholders of the permittee corporation is listed. In three columns across from these shareholders' names, information is supplied concerning: (1) Under the column headed "Initial Decision", the percentage of total shares issued to and subscribed by each of these shareholders, as set forth in the Initial Decision of the Hearing Examiner in this case, released September 12, 1960; (2) Under the column headed "June 29, 1964", the shareholdings of each of these shareholders as of the effective date of the first ownership report filed by Coral on July 2, 1964; and (3) Under the column headed "Current", the shareholdings of these persons as revealed by a review of the information in the Commission's ownership files <sup>1</sup>/<sub>1</sub> :

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<sup>1</sup> / The column headed "current" is a composite of two reports which showed various changes, filed on November 10, 1965 and December 21, 1965.

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<u>Name</u>	<u>Initial Decision</u>	<u>June 29, 1964</u>	<u>Current</u>
Leon McAskill	11.61%	11.0	6.0
Robert L. Johns	2.58	8.0	6.0
Leo Robinson	14.84	11.0	5.0
Robert A. Peterson	11.61	11.0	6.0
Cameron Stewart	11.61	11.0	6.0
Arthur Adler	14.84	11.0	6.0
W. Keith Phillips	11.61	11.0	2.8
Edwin H. Hill	14.84	11.0	-
C. L. Clements, Sr.	5.17	11.0	2.6
Norman Swetman	<u>1.29</u>	<u>4.0</u>	<u>3.0</u>
Total	100 %	100%	43.4%

7. From the above, it is clear that the original shareholders, as a group, no longer hold 50% of the stock in Coral - and, in fact, that their holdings have been reduced from 100% to 43.4%. Whatever the reasons for this development may be, <sup>2/</sup> and whenever it was that this

2/ The major dilution of majority control occurred in connection with a sale of 40% of the corporation's stock on October 14, 1965 to C. Terence Clyne and his family, which will be discussed in more detail, infra. Other transactions resulting in this loss of control involved gifts to members of the families of original shareholders, and one resulted in involuntary transfer to an executor of an original shareholder. Details of voting power, beneficiaries, ages of donees, etc. are sometimes supplied, and sometimes not supplied.



loss of majority control occurred, the legal implications of this occurrence are quite clear. Section 310 of the Communications Act expressly prohibits transfer of control of a permittee corporation without first obtaining the consent of the Commission, upon application to the Commission, and upon a finding that the public interest will be served by a grant of the application. Coral has filed no application for consent to transfer of control and apparently has no intention of doing so.

8. The need for a hearing on the question of unauthorized transfer of control could not be clearer. As the Review Board observed in WHDH, Inc., 5 RR 2d 579, 582-3, in enlarging hearing issues on this identical question: "As the instructions to FCC Form 323 point out, a transfer of control is effectuated at such time as 50% of the stock passes out of the hands of stockholders who held stock at the time the original authorization was issued." (emphasis supplied by the Review Board). Coral not only had constructive notice of this 50% test - it had actual notice of the test in the instructions to FCC Form 323.<sup>3/</sup> The flagrant nature of this violation requires, at a minimum, that this application be set for hearing on the question of whether there has been

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<sup>3/</sup> On the face of the ownership report, there is a bold faced NOTE, directing that the instructions must be read before filling out the form. This same note states that the form may not be used to report or request a transfer of control.

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an unauthorized transfer of control (either de facto or de jure) of Coral. WHDH, Inc. supra, at 583. <sup>4/</sup>

2. The Commission's files contain evidence that de facto control of Coral has been transferred to C. Terence Clyne.

9. Prior to October 14, 1965, it seems clear that the 10 original Coral shareholders maintained control of the permittee corporation. On that date, however, it appears that control of the corporation passed to one C. Terence Clyne. The facts concerning this transfer of control are set forth in the Commission's files, and most are contained in one of Coral's many applications for modification of its construction permit (BMPCT-6178, filed October 29, 1965). Under the terms of a Stock Purchase Agreement dated October 14, 1965 (Exhibit D-2 to BMPCT-6178) which appears to have been consummated on the same date it was executed, <sup>5/</sup> certain arrangements were made for sale of stock to Mr. Clyne, for collateral and loan agreements, and

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<sup>4/</sup> If Coral continues to press this application for modification of its permit, this issue may be included in the hearing. If Coral should dismiss the application, it appears that this violation of law is so serious that the Commission should issue an order to show cause under Section 312 of the Communications Act, looking toward revocation of Coral's permit for the construction of the television station.

<sup>5/</sup> Ownership reports indicate consummation of the transaction on October 14, 1965.

for control of the corporation, which seem quite clearly to place control in his hands. These and other significant developments are summarized as follows:

a. Mr. Clyne acquired 40% of the issued and outstanding stock of Coral by payment of \$150,000 (Ex. D-2, BMFCT-6178, p. 5). This, of course, was by far the largest shareholding in the corporation. No other person holds in excess of 6%.

b. Mr. Clyne undertook to obtain for Coral an effective commitment for a loan or a line of credit of up to \$600,000. It appears that he did obtain this commitment, since the loan was a condition precedent to the agreement, and since the agreement was apparently consummated on the day it was executed (id, p. 5-6).

c. All outstanding stock of the corporation is to be pledged as security for this loan. The terms of the collateral pledge do not appear in the Commission's files (id, p. 5).

d. Mr. Clyne acquired a right to select three of the seven members of the Coral Board of Directors (id, p. 8).

e. Mr. Clyne was to be selected to serve as Executive Director of the corporation (id, p. 8). It should be noted that this important post in the Coral chain of command was originally scheduled to be filled by Mr. McAskill, the corporation's president (See Initial Decision).

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f. Mr. Clyne acquired pre-emptive rights to the corporation's stock (id, p. 9).

g. Mr. Clyne acquired a right to block a sale of Coral's business (id, p. 9). Significantly, no other shareholder has this power.

h. Mr. Clyne acquired a "right of first refusal" of all Coral stock (id, p. 14-15).

i. On November 18, 1965, Mr. Clyne was elected Chairman of the Coral Board of Directors (Ownership Report, filed December 21, 1965).<sup>6/</sup>

10. It thus appears that Mr. Clyne is the largest single stockholder of Coral, by a wide margin, the remaining stock being split up among over twenty other shareholders, none of whom holds over 6% of the corporate stock.<sup>7/</sup> He is not only Chairman of the Board of Directors -

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<sup>6/</sup> This and other Coral ownership reports were filed late. For example, the first report after the April 29, 1964 grant was filed on June 29, 1964. The death of Edwin H. Hill on February 15, 1965, was not reported until November 10, 1965. Various transfers on November 11, 1965, were not reported until December 21, 1965. In fact, every report which Coral has filed has been tardy in at least one respect. These reporting violations, though serious, pale into insignificance compared to the unauthorized transfer of control issue. Nevertheless, it might be appropriate for the Commission to add an issue on this subject.

<sup>7/</sup> Mr. Clyne holds full title to only 10% of the corporate stock, the remaining 30% being held by his wife and children. Mr. Clyne allegedly votes all of these shares as "trustee" (BMPCT-6178, Exhibit A). The terms of this trust are not found in the Commission's files - another violation of reporting requirements (See Section 1.613 of the Commission's Rules).

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the highest ranking post in any corporation. He is also the Executive Director of the corporation - the man charged with implementing corporation policy (a position previously held by Coral's president). He overtly controls three of the seven seats on the Board of Directors. He has supplied or will produce almost all of the funds required to place this station on the air. <sup>8/</sup>

11. The Commission has recognized in many instances in the past that powers considerably weaker than those possessed by Mr. Clyne were adequate to lodge control in a person holding less than a majority of a permittee's stock. Radio Associates, Inc. 21 RR 368. The word "control", as used in Section 310(b) of the Communications Act, embraces every form of control, actual or legal, direct or indirect, negative or affirmative. WWIZ, Inc., 2RR 2d 169. "It is well known that one of the most powerful and effective methods of control of any business, organization, or institution, and one of the most potent causes of involuntary assignment of its interests, is control of its finances," Heitmeyer v. Federal Communications Commission, 68 U.S. App. D.C. 180,

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<sup>8/</sup> Because Coral has not supplied any information in its application to show cost of construction, it is difficult to determine whether the \$750,000 which Mr. Clyne will produce is all of the cost of construction. Hopefully, Coral will amend its application to make this clear.

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188. See also WLOX Broadcasting Company v. Federal Communications Commission, 104 U.S. App. D. C. <sup>9/</sup>

12. A particularly instructive precedent for guidance in the present case is Elyria-Lorain Broadcasting Co. 6 RR 2d 191. In common with the instant case, Elyria-Lorain concerned a licensee which had permitted over 50% of its shareholdings to pass out of the hands of the original shareholders without Commission consent. The Commission recognized that this fact, alone, required a hearing. Other factors, however, even more urgently, demanded a hearing. These factors are present in the instant case. For example:

a. A minority shareholder (46.9%) served as a director and appointed another Mr. Clyne, in contrast, supplies 3 directors.

b. The president of the minority shareholder corporation served as president of the licensee with concomitant executive powers over finances, employment, and programming. Serving both as chairman of the Board of Directors and as Executive Director, Mr. Clyne's powers are certainly no less than these.

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<sup>9/</sup> The absence of any copy in the Commission's files of the collateral agreement for the proposed bank loan makes it difficult to evaluate the nature of the lender's control, or of Mr. Clyne's relationship with the lender. Some indication of the nature of this agreement must be supplied by Coral if the Commission is expected to act upon the pending application in any fashion.

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c. None of the other shareholders appeared to take an active role in management of WEOL. It appears that Mr. McAskill has surrendered his important job of Executive Director to Mr. Clyne.

d. The minority shareholding was considerably greater than any other shareholding (46.9% to 13.1%). Mr. Clyne, as previously noted, holds a 40% to 6% lead over his nearest competitor.

13. The above facts point to a transfer of de facto control.

A question which very naturally suggests itself, in light of all of these facts, is: "If Mr. Clyne does not control this corporation, who does?"

This question can not be answered without a hearing.

D. The Commission should set the pending application for hearing to determine whether Coral may be relied upon to perform in accordance with its promises to construct.

14. Traditionally, the Commission has expressed a continuing concern that its licensees and permittees should perform in accordance with promises made in applications. <sup>10 /</sup> If the Commission cannot rely upon an applicant's promises concerning construction of a television station, the application must be denied. Salem Television Co., 4 RR 2d 281

With these principles in mind, it is helpful to review the pattern

<sup>10 /</sup> See, e.g., Jefferson Standard Broadcasting Co., 24 RR 319, 336; Florida Gulf Coast Broadcasters, Inc., 23 RR 1, 12-13; Television Broadcasters, Inc. 17 RR 1169, 1203.

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of representations which Coral has made to the Commission concerning its intention to construct a station on Channel 6 - and to contrast <sup>11/</sup> these representations with Coral's total failure to construct.

Commencing in early 1958, Coral Television Corporation has been consistently representing to the Commission that it would construct a television station on Channel 6 to serve the area south of Miami. On no occasion has it complied with these representations, even to the extent of initiating any construction at all. This pattern of failure to live up to representation is well illustrated by a chronological listing of various promises Coral has made to the Commission.

15. On April 23, 1958, Coral filed its first application with the Commission seeking a new station to operate on Channel 6, serving South Miami, Florida with a tower on Ragged Keys Tract No. 2 near Coral Gables, Florida, 315 feet above average terrain. This application (BPCT-2493) was finally granted on April 29, 1964 after extensive proceedings before the Commission (Docket No. 12668).

16. No final decision on the comparative merits of the competing

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<sup>11/</sup> With regard to representations concerning construction, "The applicant is solely responsible for complying with its own representations to the Commission, and the Commission has a right to rely upon such representations and to expect that the applicant will act in accordance therewith." Oregon Radio, Inc., 16 RR 1023, 1039.



applicants for Channel 6 was ever issued, since there was an agreement among the parties regarding payment of expenses and dismissal of an application. This merger agreement became the subject of extensive controversy and of a reopened hearing, because of character qualifications concerning a principal of an applicant who was dismissing in return for reimbursement. Subsequent to this reopened hearing, Coral Television Corporation filed on September 18, 1963 "Proposed findings and conclusions of Coral Television Corporation", expressing great concern about the need for prompt institution of a new television service on Channel 6. Coral stated (at page 4): "Coral respectfully urges that in view of the long period over which this matter has been in litigation, an expedited decision would strongly serve the public interest as well as the interest of the parties and the Commission." (emphasis supplied)

17. On May 4, 1962, Coral and South Florida (the dismissing applicant whose expenses were being paid) filed a "Joint petition for (1) approval of agreement (2) dismissal of South Florida application upon such approval and (3) grant of Coral application." The two applicants expressed intensive interest in prompt establishment of a new service on Channel 6. At page 2, they stated, "Both Coral and South Florida recognize that the continuance of a hearing proceeding would result in a further substantial delay in this case . . . perhaps up to two years, would involve considerable additional expense running into thousands of dollars of each

applicant as well as the Commission, and would delay the institution of additional television service in the Miami area." (emphasis supplied).

Under the circumstances, the parties stated that they had settled their difference in order to obtain an expedited grant and requested the Commission for a "prompt grant" to serve the Miami area. At page 4 of this same document, both Coral and South Florida urged that "the resolution of their differences on the basis indicated... and the removal of all obstacles to early grant of an additional service to the Miami area. would serve the public interest..." (emphasis supplied). At page 8 of the same document, the parties jointly urged upon the Commission that "the public interest in an additional service in the Miami area ... would be served by the authorization of that service as promptly as possible." (emphasis supplied).

18. Attached to the aforesaid joint petition was a copy of the agreement (Exhibit No. 1) among the parties. Even in drafting the agreement, Coral and South Florida recognized the pressing need for a new service as soon as possible: "Both Coral and South Florida recognize that further trial will result in further delay in... the institution of additional television service in the Miami area."

19. The Broadcast Bureau was persuaded by the logic of Coral's representation that a new service was needed in Miami as soon as possible.

In filing comments upon the joint petition, on May 11, 1962, the Bureau recommended a grant (at pages 2 and 3): "We agree with the petitioners that the full scope of the further hearing procedure in this proceeding would result in substantial delay in a final decision, and thus delay the institution of this additional television service in the Miami area." (emphasis supplied).

20. Coral's representations concerning the need for expediting a new television broadcast service in the Miami area were considered by the Chief Hearing Examiner in approving this agreement for reimbursement, in a decision released on June 5, 1962. In detailing the reasons for this approval, the Chief Hearing Examiner stated: "...termination of the proceeding in the manner contemplated by the instant agreement will expedite the establishment of a new television broadcast service in the area of Miami, Florida..." Publix Television Corp. 23 RR 855.

21. The merits of this agreement and the public interest in the grant of the Coral application were argued before the Commission by counsel for Coral on March 12, 1964. The following quotation from counsel's argument (transcript 2708, Docket 12666) illustrates that Coral was still very concerned about instituting a new service in the Miami market as soon as possible:

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"I urge in considering this not to overlook the other public interest questions involved, too, which I suggest argue strongly for expeditious termination of this proceeding, which I believe began with an application filed in 1958. When you allocated Channel 6, to the Miami area, you indicated in a decision that a fourth channel in that area was capable of independent operation and meeting the special needs of Miami.

"The situation over the years has grown more complicated and and more involved in the Miami area as the result of international complications and so forth. So the need you saw so many years ago on this basis which you separately and specifically allocated this channel to Miami is not more intense than ever, to the extent that there is an overall public interest to the long standard proceeding in making it possible for an applicant concerning which you have no questions. As far as I am aware, your decision is not indicated. The applicant is well qualified locally and prepared to go forward to its grant. The extent that there is important public interest consideration, I urge that you take into account and also for your consideration this matter." (emphasis supplied) 12/

22. The Commission was persuaded by this line of argument, and on April 29, 1964, it approved the agreement between South Florida and Coral and granted Coral's application. As an essential part of this decision, the Commission found that: "termination of the proceedings in the manner contemplated by the instant agreement will expedite the establishment of a new television broadcast service to the area of Miami, Florida." Publix Television Corp. 2 RR 2d 481. (emphasis supplied)

23. At long last, in April of 1964, Coral had a grant and could go ahead with construction. At long last, the Commission had responded to Coral's fervent pleas that an expedited decision be issued. At long last,

12/ This account of the argument by Coral's counsel is verbatim from the transcript. It was apparently garbled by the reporter, but it is still clear just what Coral was driving at.

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this purported servant of the public interest was in a position to fill this pressing, "intense" need. The atmosphere at this point of the chronology is one of breathless anticipation.

24. But then, something happened which seems to have changed the whole picture. Since April of 1964, Coral's intense activity has been largely confined to filing more applications, and making more representations concerning construction. Instead of constructing, Coral commenced an odyssey covering various portions of South Florida and the keys off of the coast. On August 27, 1964, it filed an application for modification of construction permit to make minor changes in the transmitter location to move the transmitter to Ragged Keys Tract No. 4 near Coral Gables. This was granted on October 26, 1964 (BMPCT 6004). On April 19, 1965, almost a year after its grant, Coral filed an application for modification of its construction permit to extend the completion date from April 26, 1965 to September 30, 1965. (BMPCT-6086, granted May 25, 1965). <sup>13/</sup> On October 7, 1965, Coral

13/ In Exhibit 1 to BMPCT 6086, applicant made the following statement:

"The permittee intends to go on the air from this site as soon as it is possible to do so. It honestly believes it can be on the air from this site, Commission action permitting, during 1965. It is requesting that the permit be extended until September 30, 1965 in the belief that it may well be possible to meet this deadline."

filed another application for modification of its construction permit to extend the completion date from November 25, 1965 to May of 1966. (BMPCT-6176, granted November 15, 1965).

25. On December 13, 1965, Coral had occasion to oppose the application of Scripps-Howard Broadcasting Company to move facilities for station WPTV, Palm Beach, Florida to the south (BPCT-3656). It file a "Petition to deny or designate for hearing" with reference to the Scripps-Howard application. In that pleading, at page 5, Coral made the following statement:

"Coral is a permittee of Channel 6 (WCIX-TV) and expects to complete construction of its facility and commence operation within the next six months. Of necessity and consistent with its representations to the Commission, Coral will operate its station as an independent, non-network facility." (emphasis supplied)

In that same document, Coral stated (at page 27) as follows: "Although WCIX-TV is now constructing with the intention of going on the air from its present site, it recognizes, and the Commission should recognize, the day may well come when it would be in the interests of WCIX-TV and the public for the Commission to designate an "antenna farm" in the Miami area.. either at the site of the present farm or at a differnt site." (emphasis supplied) The representation is clear and unequivocal. Coral was constructing regardless of questions of antenna farm.

26. The pattern of representation and failure to perform in accordance with representation seems quite well established. It is important

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to recognize that Coral never indicated to the Commission during all of the time that it was prosecuting its application through a hearing in Docket 12668 that the site it was proposing was anything but its ultimate and final site, the one it would use to fill the "intense" need for service. As a matter of fact, Coral considered its transmitter site to be so superior that it sought a major preference for comparative coverage in its proposed findings of fact and conclusions of law filed in Docket 12668 (Paragraph 388, page 144). In fact, at page 152 of this document, Coral requested a "substantial preference" with respect to proposed coverage.

27. By the nature of its regulatory process, the Commission is required to place extensive reliance upon representations by its licensees, permittees and applicants. Oregon Radio, Inc., supra. The representations which Coral made in 1964 concerning the pressing and immediate need for a new service were material representations required to obtain approval of South Florida's agreement to dismiss. As the Commission observed in refusing to permit a similar arrangement in National Broadcasting Company, Inc., 25 RR 67, 73 (1963):

"In the case of a withdrawal involving applications for a construction permit, the public interest suffers to the extent the Commission no longer has a choice of selecting the best qualified applicant. But that detriment is more than offset by the consideration that the withdrawal permits one of several qualified applicants to bring a needed service to the public without the lengthy delay involved in the multi-party comparative hearing. "



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Coral knew that it was necessary to allege a ready willingness to construct in order to obtain its 1964 grant. It recited the necessary representation. The Commission relied upon that representation. Coral's performance has been, at a minimum, disappointing. The Commission should not hazard the chance that Coral may again fail to perform if greener pastures beckon.

The premises considered, it is respectfully requested that this application be set for hearing on issues suggested in the foregoing paragraphs.

Respectfully submitted,

L. B. Wilson, Inc.

April 29, 1966

By Robert A. Marmet  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

RECEIVED

APR 29 1966

F. C. C.  
OFFICE OF THE SECRETARY

In re Application of )

CORAL TELEVISION CORPORATION (WCIX-TV) )  
South Miami, Florida )

BMPCT-6256

For Modification of Construction )  
Permit to Change Station Location, )  
Transmitter Location, and Increase )  
Height )

Before the Commission )

PETITION TO DENY

Storer Broadcasting Company (hereinafter "Storer"), permittee of UHF Television Station WGBS-TV, Channel 23, Miami, Florida, by its attorneys and pursuant to the provisions of Section 1.580(i) of the Commission's Rules, herewith respectfully petitions that the above-styled application be denied. In support whereof the following is shown:

I. Standing to Object

1. Coral Television Corporation (hereinafter "Coral") is presently authorized to construct a South Miami television station (WCIX-TV) on Channel 6, using 100 kw power and an antenna 501 feet above average terrain located on Ragged Key No. 3 in Biscayne Bay. Its instant application proposes to modify that authorization so as to specify a new transmitting location on the mainland near Princeton, Florida, with antenna 1,003 feet above average terrain and 87.25 kw power, and to re-designate the station as a Miami rather than a South Miami station.

2. Storer is permittee of UHF Station WGBS-TV, Channel 23, Miami, Florida, which is authorized to construct facilities in the Miami antenna farm, using 501 kw power at 902 feet above average terrain.

3. Attached hereto is an Engineering Report of Mr. Glenn G. Boundy, Vice President for Engineering, Storer Broadcasting Company, which includes a map showing Coral's presently authorized service contours and those which would obtain if its instant application were granted. It also sets forth the comparative population coverage data for the principal city, Grade A and Grade B contours under Coral's present and proposed authorizations. As indicated, Coral's signal in the entire Miami area would be substantially improved, as would the populations within its service contours.

4. The substantial improvement of Coral's signal and population coverage in the Miami area, together with the proposed re-designation of WCIX-TV as a Miami rather than a South Miami station, would intensify its competition with WGBS-TV for audience, advertisers and revenues. Accordingly, Storer has the requisite standing as a party in interest under Section 309 of the Communications Act to petition to deny the instant application. Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

## II. Public Interest Considerations

5. A grant of the Channel 6 move-in would be inconsistent with the national television intermixture goals as expressed in the 1962 all-channel receiver legislation and implemented by the Commission since that enactment, because in all

likelihood it would foreclose UHF development in South Florida for the foreseeable future. Additionally, it would serve as a deterrent to potential UHF applicants in all areas of the country, thereby depressing the climate of growth which the Commission has been attempting to cultivate since passage of the all-channel legislation.

6. These statements are not made idly, but reflect Storer's experience with UHF television in this area and its study of present conditions. Storer acquired WGBS-TV in December of 1954, immediately after the multiple ownership rules were relaxed to permit ownership of two UHF stations in addition to the normal VHF limit. It devoted an all-out commitment of resources, energies and operating experience to the station, but was forced to suspend its operations in April of 1957 after suffering operating losses of \$432,978.52. At that time it was in competition with two commercial VHF stations and a third had been authorized. Most of WGBS-TV's physical facilities were disposed of, but its construction permit was retained in the hope that resumption of operation would one day become feasible.

7. Since WGBS-TV suspended operations in 1957, a fourth commercial VHF station -- Coral's WCIX-TV -- has been authorized in the market, but with a South Miami designation and a relatively low antenna. It has never commenced operations, its most noticeable activity having been the filing of successive modification applications to shift from Ragged Key No. 2 to No. 4 to No. 3, and now to the mainland. <sup>1/</sup>

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<sup>1/</sup> Official notice of the WCIX-TV license file is requested.

8. On the other hand, since enactment of the all-channel receiver legislation in 1962 the Commission has embarked on a course of commitment to UHF development and growth, designed to accomplish -- as a basic national television goal -- the use of all channels on an intermixed basis. <sup>2/</sup> It stressed that goal only a month ago in its Second Report and Order in Docket 15971, recognizing the importance of encouraging UHF ventures now which would not have been feasible in the 1950's: <sup>3/</sup>

"The UHF trend. As stated in our Notice, we are at a watershed in the development of UHF broadcasting. UHF broadcasting generally suffered a very serious setback in the 1950's and limped along until the passage of the all-channel receiver legislation. In enacting this 'unique' legislation in 1962, Congress made the judgment that development of UHF 'is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States'.... Thus, as shown by the above and the compulsory sale of all-channel sets at the rate of over 9,000,000 a year, Congress and the American public have staked a great deal on the development of UHF.

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"With this increased ferment in UHF, we believe that the next few years will supply the critical answer to whether the Congressional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved."

Partly as a result of the set legislation itself, and partly as a result of the Commission's encouragement to potential telecasters and program suppliers, UHF television has gained in impetus to the extent that risk-taking is no longer unthinkable for the present, and may be justified in terms of the future.

<sup>2/</sup> In re Amendment of Section 3.606, Bloomington-Indianapolis, Indiana, FCC 65-718, Par. 9, released August 2, 1965.

<sup>3/</sup> 6 RR 2nd 1717, 1772 (1966).

9. Accordingly, in the May 13, 1965 oral proceeding on "idle UHF permits", Storer advised that it would reconstruct and reactivate WGBS-TV, and that it had that day applied to modify its authorization for that purpose (BMPCT-6106, subsequently granted July 22, 1965). <sup>4/</sup>

10. In advising the Commission of this decision, Storer made clear that it was not entertaining any naive hopes, and that it did not expect competing under existing circumstances to be easy, but that it was again willing to pioneer UHF so long as a reasonable possibility of success exists. It also made clear, however, that commercial UHF in Miami is not now feasible unless existing competitive conditions are maintained, i. e., that no additional channels are added and that the facilities assigned to the existing VHF channels are not improved. Storer then stated the following qualifications to its commitment: <sup>5/</sup>

"...we know that under present conditions it will be difficult to make a Miami UHF station financially self-sufficient. We have seen no developments on the horizon that will make it any easier. We are willing to perform whatever service we can for UHF by again pioneering in that service. But we trust that the Commission will recognize that additional competition in Miami will make it impossible for either Channel 23 or 33 to succeed. We must give fair notice that if any changes are made in the Miami or West Palm Beach allocations or in the power, antenna height and transmitter sites now assigned to the existing VHF channels that increase competitive problems of UHF, it will spell the death knell of both Channel 23 and Channel 33, and certainly we would not be able to continue if we thought the cause of UHF was entirely hopeless.

<sup>4/</sup> Dockets 15889 et al., Tr. 125-35.

<sup>5/</sup> Tr. 132.

"With this understanding, Storer hereby commits itself to constructing and operating WGBS-TV for a period sufficient in its judgment to determine whether commercial UHF can be successful under the conditions applicable in Miami."

11. Based on this commitment the Commission extended and subsequently modified the WGBS-TV construction permit in accordance with Storer's May 13, 1965 application. In turn, Storer has re-acquired the tower, transmitter building and land formerly used by WGBS-TV, ordered the custom-designed directional antenna specified in its construction permit, secured and substantially installed the new transmitter, repaired and repainted the tower, and otherwise pursued its operational planning with the objective of being on the air approximately sixty days after delivery of the antenna.

12. Coral's proposal to move WCIX-TV to the mainland, double its antenna height, and claim status as a Miami station, however, casts a different light on the matter. As shown in the attached Engineering Statement, this move-in would add 255,797 persons to the WCIX-TV principal city service area, an increase of 53.5% over that presently authorized, and it would add 127,705 persons to its Grade A service area, an increase of 14.8%. It would substantially extend the service contours and intensify the signal within them to the extent that WCIX-TV would for the first time be authorized meaningfully to serve the rapidly expanding and densely populated areas north of Miami.

13. Storer has carefully examined this proposal and concluded that, if it is granted, it would make impracticable the resumption or continuation of WGBS-TV's UHF operations at this time. Considering the multitude of competitive television signals now available in the market from both Miami and Palm



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Beach, and considering the present conditions of program availability and of UHF set saturation, a move-in of Channel 6 with increased facilities would make it necessary to withhold further progress on UHF in the Miami area. Under these conditions Storer certainly would want to avoid placing WGBS-TV in a position where it would have to leave the air, because of the probable psychological impact this would have on UHF generally. Accordingly, it could not in prudence place the station on the air in the first instance. At some future date, conditions of program availability, set saturation and market growth might make this possible, but those conditions do not exist today if the Channel 6 move-in is approved.

14. Coral's requests for waiver of the mileage separations requirements and the city coverage requirements <sup>6/</sup> must be viewed against this background. And, it is submitted, the reasons advanced to support these waivers are insufficient when so considered. Coral relies on its interpretation of the Commission's 1958 action allocating Channel 6 to the Miami area, whereas developments since 1958 have changed the situation entirely. Basically, it is Coral's position that the 1958 drop-in of Channel 6 was considered necessary to provide for a competitive fourth station, and even that the Commission there implied a favorable predisposition toward this kind of waiver in the event of a future adjudicatory (application) proceeding. <sup>7/</sup> But in advancing this interpre-

<sup>6/</sup> Coral has filed a separate document requesting waiver of Sections 73.610 and 73.685 of the Commission's Rules, because its proposed facilities are short-spaced from co-channel WDBO-TV, Orlando, and because the principal city signal would not completely encompass Miami.

<sup>7/</sup> See Coral's Petition for Waiver, Paragraphs 1-2. Storer does not agree that the Commission evidenced the predisposition alluded to. It did, after all, refuse to make the assignment at short spacings.

tation Coral overlooks the context in which the Channel 6 drop-in was made. The time was 1958, when UHF in general was "limping along" after having suffered its serious setback.<sup>8/</sup> In Miami, it was apparent at that time that UHF could not compete effectively with the three VHF stations; the Order assigning Channel 6 expressly referred to this and concluded that only a VHF channel would provide the basis for a competitive fourth station -- "in light of the existing television situation in Miami." <sup>9/</sup>

15. After the assignment was made, Coral did not apply for a Miami station but for South Miami. After receiving its construction permit it did not put the station on the air. For reasons which it alone is able to describe, Coral waited until 1966 to abandon its Ragged Keys proposal and to seek Miami status directly through a mainland site and increased antenna height.

16. In the interim period since the Channel 6 drop-in, of course, the 1962 all-channel set legislation was enacted, and the Commission embarked on its renewed efforts, previously described, to stimulate UHF growth and development. And at this point, where it is reasonably possible for UHF to promise a fourth competitive Miami station, it is no longer necessary to waive VHF mileage separations and coverage requirements for this purpose. Thus the situation is not what it was in 1958, and reasons which might have been advanced for waiver at that time have lost their force in 1966.

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<sup>8/</sup> See the Commission's description of this, quoted at Paragraph 8, above.

<sup>9/</sup> Miami Drop-in Case, 15 RR 1642a, 1642c (February 1958).

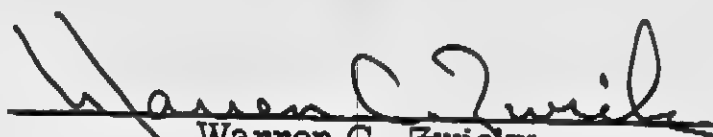
[491]

17. To summarize, if the proposed Channel 6 move-in were necessary to provide a fourth commercial station in Miami, this fact might require balancing against the failure to meet the terms of the mileage separations and city coverage rules. But it is not so needed. Accordingly, it should not be granted.

Respectfully submitted,

STORER BROADCASTING COMPANY

By

  
Warren C. Zwicky  
Vice President and Washington Counsel

711 Madison Building  
1155 - 15th Street, N. W.  
Washington, D. C. 20005

April 29, 1966

Subscribed and sworn to before me this

29th day of April, 1966.

  
Notary Public, D. C.

My commission expires April 14, 1971.

## ENGINEERING STATEMENT

The attached map was prepared to show the Grade A, Grade B and the 74 dbu City Coverage contours for the presently authorized operation of Television Station WCIX-TV, Miami, Florida, and the same contours for the operation proposed in its application for modification of construction permit (BMPCT-6178) filed with the Commission on March 15, 1966.

The presently authorized operation specifies a transmitter location on Tract No. 4, Ragged Keys, Florida, and the operation proposed in the application for modification specifies a transmitter location 3.7 miles West of Princeton, Florida. The authorized and requested facilities are as follows:

	<u>Channel No.</u>	<u>Effective Radiated Power</u>	<u>Antenna Height AAT</u>
Authorized	6	20 dbk (100 kw)	500 ft.
Requested	6	19.41 dbk ( 87.25 kw)	1003 ft.

The contours shown on the attached map were projected from data filed with the respective applications.

A population study was made to determine the population within each of the contours shown on the map. The results of this population study

are shown in the following tabulation:

	<u>City Coverage Contour (74 dbu)</u>	<u>Grade A Contour</u>	<u>Grade B Contour</u>
BMPCT-6256	733, 117	986, 348	1, 304, 758
Presently Authorized	477, 320	858, 643	1, 283, 885
Population Gained	255, 797	127, 705	20, 873
Percentage Gain	53.5%	14.8%	1.6%

Populations are based on Minor Civil Divisions of the U. S. Census for 1960.

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STATE OF FLORIDA     )  
                              ) SS  
COUNTY OF DADE     )

GLENN G. BOUNDY, being duly sworn, deposes and says:

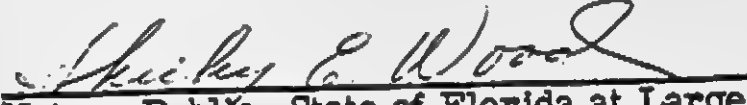
1. That his qualifications are a matter of record with the Federal Communications Commission.

2. That he is employed by Storer Broadcasting Company as Vice President for Engineering, and that he has either prepared or directly supervised the preparation of the technical information contained in this Engineering Statement and attached exhibits, and that the facts stated therein are true of his own knowledge, except as to such statements as are therein stated to be based on information and belief, and as to such statements he believes them to be true.

  
Glenn G. Boundy

Subscribed and sworn to before me

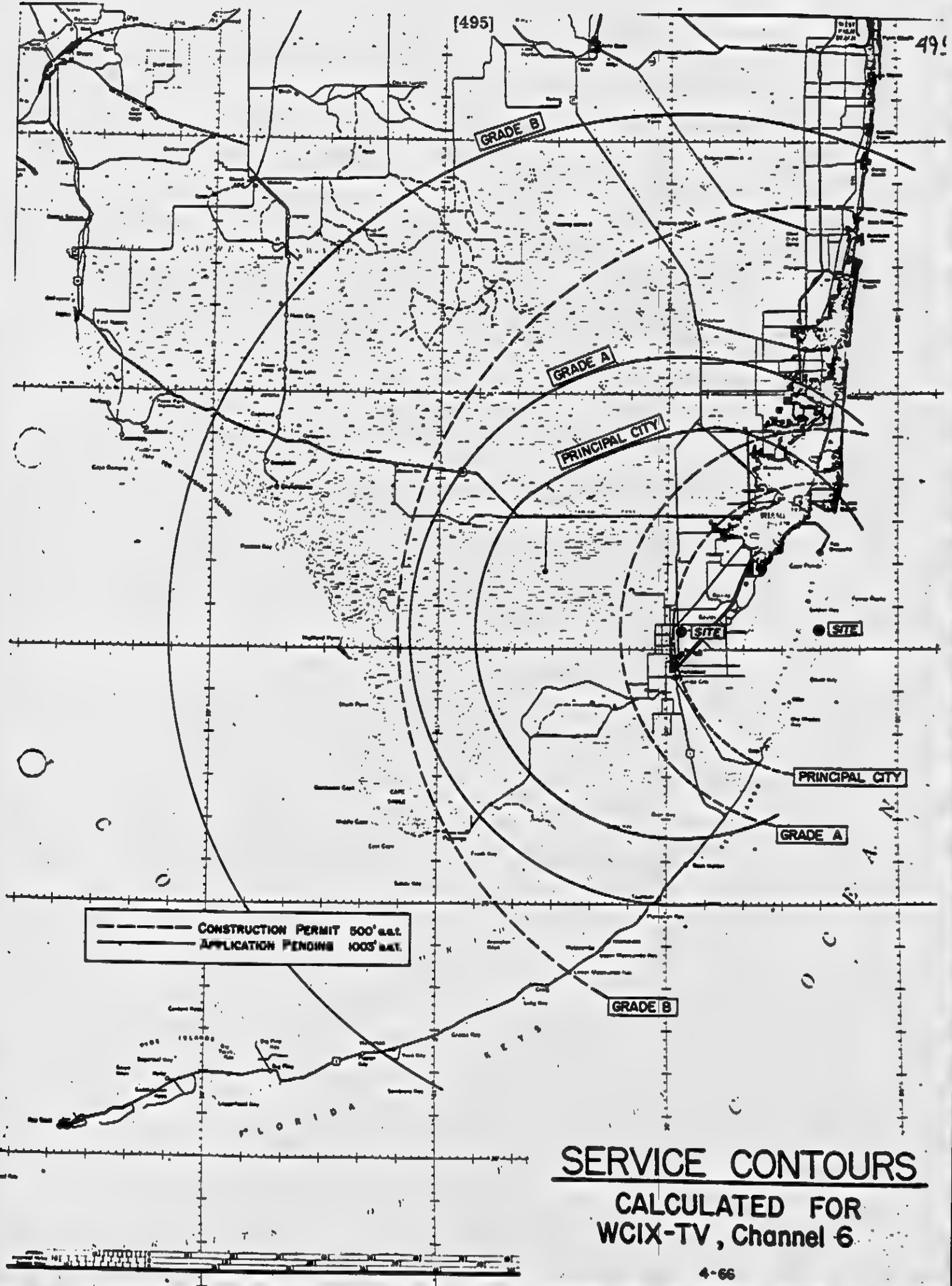
this 27th day of April, 1966.

  
Notary Public, State of Florida at Large  
NOTARY PUBLIC STATE OF FLORIDA at LARGE  
MY COMMISSION EXPIRES NOV. 21, 1966  
BONDED THROUGH FRED W. DIESTELHORST

JA 51

[495]

491





JA 52

[103]

RECEIVED

MAY 2 1966

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION F.C.C.  
WASHINGTON, D. C. 20554 OFFICE OF THE SECRETARY

In the Matter of  
the Applications of

THE OUTLET COMPANY  
WDBO-TV, Orlando, Florida

CORAL TELEVISION CORPORATION  
WCIX-TV, South Miami, Florida

For Construction Permits  
To Change Sites

File No. BPCT-3742.

File No. BMPCT-6256 ✓

OBJECTIONS OF ASSOCIATION OF  
MAXIMUM SERVICE TELECASTERS, INC.

1. In the above-captioned applications, The Outlet Company (WDBO-TV), licensee of WDBO-TV, Channel 6, Orlando, Florida, and Coral Television Corporation (WCIX-TV), permittee of WCIX-TV, Channel 6, South Miami, Florida, each proposes to move its transmitter from a site which meets the minimum co-channel mileage separation requirement to the other's existing site<sup>1/</sup> (and all other mileage separation requirements) to a new site which is short spaced to both the present and proposed site of the other. Each seeks waiver of the mileage separation requirements of Section 73.610 of the Commission's Rules.

(a) WDBO-TV proposes to move 19.6 miles from its present site on the west edge of Orlando<sup>2/</sup> to a site 18 miles east of the city. WDBO-TV's proposed site is

<sup>1/</sup> The distance between the present sites of WDBO-TV and WCIX-TV is 221.5 miles.

<sup>2/</sup> Engineering Affidavit accompanying WDBO-TV's Petition (WDBO-TV Engineering Affidavit), page 1.

only 218.5 miles from the present site of WCIX-TV, or 1 mile less than the required separation under Section 73.610 of the Rules for co-channel stations in Zone III. WDBO-TV's proposed site is only 213.9 miles from the proposed site of WCIX-TV, or 5.6 miles less than the required co-channel separation.

(b) WCIX-TV proposes to move 17.1 miles generally west of its present site to a new site which is only 215.3 miles from the present site of WDBO-TV, and only 213.9 miles from the proposed site of WDBO-TV. Thus, WCIX-TV's proposed site is 4.2 miles short spaced to WDBO-TV's present site, and 5.6 miles short spaced to WDBO-TV's proposed site.

2. Because of the proposed violations of Section 73.610 of the Rules, and pursuant to Section 1.587 of the Rules and Section 6(a) of the Administrative Procedure Act, the Association of Maximum Service Telecasters, Inc. (MST), objects to each application for construction permit to change site.<sup>1/</sup> MST requests that both petitions for waiver be dismissed or denied and both applications dismissed without further proceedings. If not so dismissed; MST requests that both applications be designated for hearing.

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<sup>1/</sup> Neither application or petition refers to the other, and there has been no amendment to reflect the other.

On the other hand, if the applicants could work out some arrangements for new transmitter sites that would not involve any short mileage separations, MST would no longer object to the applications.

3. MST is an association of 160 television stations -- VHF and UHF, commercial and educational -- serving large, small and medium-sized communities and suburban, rural, farm, and outlying areas throughout the country. MST and its member stations are dedicated to the continuation and expansion of the high technical quality wide-area television service enjoyed by the American public. In furtherance of this objective, MST has participated in a variety of proceedings before the Commission in which the safeguards of high technical quality television service were threatened. MST has consistently opposed proposals (whether made in rule making proceedings or with respect to specific applications) in derogation of the Commission's minimum mileage separation requirements -- the cornerstone of the American high technical quality wide-area television system. The Commission has consistently recognized MST's right to file objections with respect to specific applications and has taken MST's objections into account.<sup>1/</sup> Indeed, MST's objections were considered and ruled upon

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<sup>1/</sup> E.g., In re Application of WKTV, FCC 66-365 (April 26, 1966); In re Applications of WTCN-TV, WCCO-TV, and KMSP-TV, FCC 65-103 (February 15, 1965), modified on rehearing, 5 R.R.2d 572 (1965); New Orleans Television Corp., 23 R.R. 1113-14 (1962); Fisher Broadcasting Co., 25 R.R. 746-47 (1963); Capital Cities Broadcasting Corp., 24 R.R. 675 (1962).

in previous proceedings involving a proposed short separation for Channel 6 stations at Orlando and Miami.<sup>1/</sup>

I. THE REQUESTS FOR WAIVER SHOULD BE DISMISSED OR DENIED AND THE APPLICATIONS DISMISSED WITHOUT FURTHER PROCEEDINGS.

4. Section 1.3 of the Rules provides that other provisions of the Commission's Rules may be waived only "if good cause therefor is shown." Similarly Section 1.566(a) of the Rules requires that "requests for waiver shall . . . set forth the reasons in support thereof." Thus, the Rules themselves leave no doubt that an applicant seeking waiver has the burden of demonstrating that a rule should not be applied to him in a particular situation. Moreover, the Commission has pointed out on numerous occasions that one who seeks waiver of the mileage separation rules -- which provide the fundamental safeguards against destructive and degrading interference to television service to the public -- has a particularly heavy burden in this regard.

5. Thus, in Camellia Broadcasting Co., 20 R.R. 12, 14 (1960), the Commission stressed (a) that the "rule for which waiver is sought [Section 73.610] concerns channel and distance separations which involve the most important of allocations principles," (b) that there will be no waiver except "for the most cogent of reasons," and (c) that "a request for waiver must show on its face the exis-

tence of circumstances making application of the rule [Section 73.610] inappropriate, for if a mere request for

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1/ Amendment of Section 73.606 (Miami, Florida), FCC 57-412 (April 29, 1957), aff'd on reconsideration, FCC 58-148 (February 21, 1958).

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waiver automatically was granted a rule would no longer be a rule." Four particularly pertinent cases -- United States v. Storer Broadcasting Company, 351 U.S. 193 (1956), Capital Cities Broadcasting Corporation (WKBW-TV), 5 R.R.2d 464 (1965), Television Wisconsin, Inc. (WISC-TV), 5 R.R.2d 468 (1965), and Mid New York Broadcasting Corp. (WKTV), FCC 66-365 (April 26, 1966) -- emphasize the heavy burden on an applicant seeking waiver and stress the point that unless the applicant sets forth allegations of fact sufficient, if true, to justify waiver, it is not even entitled to hearing on its request for waiver. As stated in Television Wisconsin, Inc. (WISC-TV), supra, "In order to justify an ad hoc exception to a rule, it is incumbent upon the party seeking the exception to show that there are public interest considerations which override those public interest considerations implicit in the promulgation of the rule." Moreover, in WTCN Television, Inc., 5 R.R.2d 572 (July 14, 1965), the Commission declared:

"We are convinced that a television applicant seeking waiver of Section

73.610(a) of our Rules should have the burden of proving every element necessary to show that the public interest will be served by the requested derogation of our Rules." (5 R.R.2d at 575).

Thus, a request for waiver of the mileage separation requirements is to be dismissed outright absent a convincing threshold showing of affirmative public interest reasons for grant of a waiver.

6. Neither WDBO-TV nor WCIX-TV has made the necessary affirmative threshold showing required by the Commission's Rules and decisions in order to avoid denial of its

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waiver request and dismissal of its application without further proceedings. Neither has made the required showing based upon the other remaining at its present site. Neither has made any showing based upon the other also moving to its proposed site.

As to Miami specifically, the Commission stated:

"In Miami, which already has three commercial VHF assignments, we are proposing to add a 4th [Channel 6] which it appears can be accomplished in accordance with minimum transmitter spacing requirements." 13 R.R. at 1583.

(b) Channel 6 was assigned to the Miami area in 1957. Miami Drop-In Case, 15 R.R. 1638a (1957). The Commission contemplated that Channel 6 would be used at full mileage separations and declared:

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### III. WCIX-TV'S PROPOSAL.

18. WCIX-TV's proposal to relocate its transmitter at short spacings must be viewed against the background of the conditions under which Channel 6 was originally assigned to the Miami area and the events which have followed.

(a) The Commission proposed to allocate Channel 6 to the Miami area in 1956 as part of the general television allocations proceeding in Docket No. 11532. Second Report on Deintermixture, 13 R.R. 1571 (1956). In that proceeding certain parties had proposed departure from the Commission's mileage separation requirements as one solution to the then claimed shortage of VHF frequencies. This proposal was rejected by the Commission, on both a long range (13 R.R. at 1575) and a short range basis (13 R.R. at 1582), because



"12. Orlando Broadcasting also opposed the allocation of Channel 6 to Miami on the grounds that it would cause destructive interference to substantial portions of its service area and that, since the mileage

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"On June 21, 1955, the UHF Industry Coordinating Committee requested that the Commission amend the rules so as to permit the authorization of VHF stations on a case-to-case basis at lower separations than are permitted at present. Whether such authorizations were processed on a case-to-case basis or on the basis of a general reduction of minimum separations, the Commission has concluded, for the reasons already given, that the authorization of additional VHF stations at sub-standard transmitter spacings would not be desirable." 13 R.R. at 1587.

The Commission then decided to consider some new VHF assignments and one of the criteria to be used was

"Whether it is possible to locate the new transmitter so as to meet minimum spacings. . .  
Ibid.

The Commission also pointed out:

"In appropriate instances it may be desirable . . . to add an additional VHF assignment which meets all requirements of the present rules with the exception that the minimum spacing from the city where the new assignment is proposed would be met. It would be feasible, however, in these instances, by appropriate location of the new transmitter, to meet all transmitter spacing requirements. Since it is the spacing from the transmitter that is critical, we believe that new assignments that can be utilized within reasonable distance from the city in conformity with the minimum transmitter spacing requirement. In this way additional service can be provided without departing from the engineering standards." 13 R.R. at 1582.

"9. At the outset we must determine whether the conflicting proposals for the assignment of Channel 6 . . . would meet the technical allocation requirements, since if such a determination cannot be made with respect to each proposal, there is no need to proceed to the consideration of their comparative merit. Consideration was given to the possibilities offered by proposals calling for departure from the engineering standards . . . and we have repeatedly rejected such proposals, whether on a general or case-by-case basis . . .

"10. . . .

"11. The assignment of Channel 6 to Miami can be accomplished in conformity with the Commission's minimum mileage separation requirements by locating the transmitter for a Miami Channel 6 station south of Miami so as to maintain the required 220 mile separation from the co-channel station (WDBO) at Orlando and the required 60-mile separation from the adjacent channel station (WPTV) on Channel 5 at West Palm Beach. However, the opponents argue that because of aeronautical considerations in the area around Homestead, Florida, where a site must be used to meet separation requirements, antenna towers of sufficient height cannot be utilized which would enable a station to cover Miami with the required city grade service. In our view, such a conclusion cannot be reached from the record. The record demonstrates that a transmitter can be located in an area south of Miami from where the requisite minimum city-grade signal could be placed over the city. The question of whether aeronautical hazards and limitations would preclude utilization of a particular site in this general area south of Miami in conformity with separation and coverage requirements is one which we believe can more readily be resolved, in connection with a particular station application or applications, where a specific proposal or proposals for a tower location and height are before us. We do not believe the record supports the basis for concluding that it would not be possible to obtain a satisfactory site.

of interference problems and because of the adverse impact on UHF development. Thus the Commission declared that:

" . . . [I]t is clear that the widespread use of new VHF assignments at sub-standard spacings would discourage the building of additional UHF stations, and in many instances would reduce the opportunities for successful operation of UHF stations now on the air. Thus in most of the larger markets the assignment of a VHF station at sub-standard spacings would operate to place an artificial ceiling on the number of stations which could eventually be established. For all of these reasons we have been unable to find that the addition of new VHF assignments at sub-standard spacings would serve the public interest. For reasons which are discussed later, we believe, however, that it may be desirable to relax the present rules concerning minimum assignment separations to the extent necessary to permit the assignment of additional channels which do not meet the separation from the new city, provided all separations will be met from the new transmitter on these channels." 13 R.R. at 1575-76.

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separation requirements precluded the use of the Miami 'antenna farm' as the site for a Channel 6 station, the allocation would be inconsistent with the Commission's policy to encourage the development and utilization of 'antenna farms'. Neither of these arguments has merit. Channel 6 in Miami would meet all allocation requirements, and the Rules provide that existing stations are afforded protection from interference by the minimum separation requirements and the maximum heights and powers. . . . With respect to Orlando's argument concerning our 'antenna farm' policy, we wish to state that, while we recognize the decided advantages of so-called 'antenna farms' in certain cir-

cumstances, we have never based our determination of whether a television channel should be assigned to a particular community on the question of whether an available 'antenna farm' could or could not be utilized in conformity with the Rules. We see no inconsistency in not doing so here. We do not believe that the fact that an 'antenna farm' cannot be used should preclude the assignment of a much-needed additional outlet. . . .

"13. . . . While the opponents urge that a Channel 6 station located south of Miami would be at a competitive disadvantage with the VHF stations located north of Miami at the 'antenna farm', we believe any such disadvantage would be of short duration and would not inhibit the opportunities for a Channel 6 station to compete on a comparable basis in the area. It is our judgment, therefore, that the allocation of Channel 6 to Miami would serve the public interest by creating improved opportunities for comparable and effective competition and insuring the likelihood of more and better television service and more local television outlets in the Miami area." 15 R.R. at 1640-42.

(c) Upon reconsideration of the foregoing Report and Order in 1958, 15 R.R. 1642a, the Commission again firmly rejected arguments that Channel 6 be used at short separations. It declared:

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"5. In its petition for reconsideration, Gerico claims that the record demonstrates that the air-space considerations involved in the use of a site for a Channel 6 station at Miami in conformity with technical requirements makes such operation infeasible, and that, in light of this and the television situation in Miami, the Commission erred in rejecting its counterproposal for the use of Channel 6 at the Miami antenna

farm even though mileage separations could not be met from such a site. Gerico urges that a waiver of the technical requirements to permit the use of Channel 6 at the antenna farm, at substandard spacings, is required in order to carry out the objectives of Section 307(b) of the Communications Act and the objectives outlined in our June 26th Report and Order in the general television allocation proceeding. . . .

"6. We have carefully examined the arguments and facts submitted by the petitioners in support of their petitions for reconsideration. . . . We also adhere to the view that, on the basis of the record, the allocation of Channel 6 to Miami should not be precluded because of the possibility that a site for such an operation meeting all spacing and coverage requirements might be infeasible because of aeronautical considerations. A Channel 6 Miami station may be located in an area south of Miami in conformity with all technical requirements, and we cannot conclude from the record that a site would not be authorized meeting all technical requirements. As we stated in our prior decision, the question of aeronautical hazards and limitations is one which can more readily be resolved -- and one which we believe is more appropriately considered -- at a time when particular applications with specific proposals for tower location and height are before us.

"7. We disagree with Gerico that our rejection of its proposal to permit the use of Channel 6 at the Miami 'antenna farm' at less than required spacings was in error. In our study of proposals requesting that deviations from the technical requirements be permitted on a general or case-by-case basis as a solution for television problems in the general television allocation proceeding in Docket 11532, for the reasons detailed in our decision therein, we concluded that adoption of such proposals in

the achievement of our immediate objective of enhancing the opportunities for more effective competition among stations pending further progress or completion of our long-range plans for improving the television allocation structure would not serve the public interest. We do not believe that Gerico has made any showing in this proceeding which would warrant a departure from this policy. In our judgment, the assignment of Channel 6 to Miami in conformity with all technical requirements is in the public interest and fully comports with the requirements of Section 307(b) of the Communications Act and our television objectives." 15 R.R. at 1642b-1642c. (Footnotes omitted.)

(d) In 1964, WCIX-TV received its construction permit for Channel 6 at South Miami, but as yet has not begun construction. The fact is that WCIX-TV was able to secure a site for Channel 6 which meets mileage separation requirements and for which FAA approval has been secured.

19. It is in this posture of repeated rejections of short spacings for Channel 6 at Miami that WCIX-TV's application for a short-spaced site is to be considered.

20. WCIX-TV basically asserts that its presently authorized facilities, licensed to South Miami, would not be able to provide city-grade service to all of Miami, and that waiver should be granted to permit it to do so.<sup>1/</sup> But WCIX-TV has not demonstrated why public interest requires that it place a city-grade signal over all of Miami. WCIX-TV has failed to show where the predicted City Grade, Grade A



and Grade B contours under its present authorization fall in relation to Miami. However, it does show that its presently authorized facilities permit city-grade service to

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1/ WCIX-TV Petition, page 2.

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at least "20% of the Miami land area."<sup>1/</sup> In fact, WCIX-TV would provide city-grade service to 85 per cent of Miami, and Grade A service to the balance of Miami with its presently authorized facilities. The concept of Grade A service is based on sufficient field strength (68 db for Channel 6) to overcome receiver noise and "local noise and interference under urban conditions."<sup>2/</sup> In any event, WCIX-TV has made no showing that its presently authorized coverage is inadequate in terms of public interest.

21. Moreover, WCIX-TV has failed to demonstrate either that it could not obtain additional height at its present site, or that it could not obtain a height at a site meeting mileages which would permit it to deliver an even stronger signal to Miami than would be possible with its authorized facilities.

(a) As to its present site, WCIX-TV states only that attempts before the FAA to increase height "so that



adequate coverage of Miami could be achieved were rejected.<sup>3/</sup>  
 However, WCIX-TV does not describe the nature of its proposals to FAA or of the FAA "rejection." Nor does it recount the efforts that it made in this connection.<sup>4/</sup>

(b) As to other sites meeting mileage separations, the MST Engineering Affidavit, Map 5, shows that there is a large area in South Florida in which a Channel 6 transmitter could be located meeting all mileage separation requirements. Map 5 also shows the transmitter heights required in particular parts of this area to enable WCIX-TV

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1/ WCIX-TV Petition, page 2.

2/ Pages 1-2, Appx. B to Third Notice in Docket No. 8736, etc. (FCC 51-244, March 22, 1951), and adopted in the Sixth Report and Order, 1:3 R.R. (Reports) 91:601, 91:630-31 (1952).

3/ WCIX-TV Petition, page 2.

4/ Also, WCIX-TV apparently uses "adequate" as a synonym for "city grade."

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to provide City Grade service to all of Miami. WCIX-TV has not demonstrated that it could not obtain sufficient height at a site in this area to enable it to improve its signal in Miami above that possible with its present facilities, if not to provide city-grade service to all of Miami.<sup>1/</sup> WCIX-TV makes only the bare assertions that "no suitable site was available"<sup>2/</sup> and that "[U]ntil recently WCIX-TV has had little or no encouragement in seeking permission to construct a tower on the mainland which would permit the

maximum utilization of the channel."<sup>3/</sup> These assertions, unsupported by any facts or particulars, are insufficient to justify even a hearing on the waiver request. Moreover, the assertions themselves undercut WCIX-TV's case. Thus, the reference to recent "encouragement" from aeronautical interests indicates that possibilities for tower height improvements in South Florida in the area meeting mileage requirements may be brightening.

22. The paucity of WCIX-TV's showing as to aeronautical considerations is particularly glaring in light of the history of the assignment of Channel 6 to the area set out in Paragraph 18 above. Channel 6 was allocated to the area because and only because the Commission found that an area was available for a transmitter site meeting mileages. The Commission twice gave exhaustive consideration to proposals that a short separation be permitted, but

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<sup>1/</sup> As noted above, WCIX-TV has not demonstrated why public interest requires that it, as a South Miami station, should provide city grade service to all of Miami.

<sup>2/</sup> WCIX-TV Petition, page 2 (Emphasis added).

<sup>3/</sup> Ibid.

rejected them both times. Among other things, the Commission pointed out that the record failed to show that a short separation was necessary because of aeronautical considerations. In light of WCIX-TV's lack of a showing as to why

it could not increase height at its present site or at some other site meeting separation requirements, the record is still deficient. Indeed, in its present petition and application, WCIX-TV makes a much weaker showing than was made before the Commission in connection with the 1957 and 1958 rejections of short separations for Channel 6. Certainly, WCIX-TV has not made a sufficient showing here to warrant the "adjudicatory proceeding" looking toward possible waiver of the Rules which it mentions. For this reason alone, its application and petition should be summarily dismissed.

23. Apart from the foregoing considerations, and whatever basis there might have been in 1957 and 1958 for the Commission to have been concerned with employing Channel 6 so as to provide city grade service to all of Miami, if possible,<sup>1/</sup> there is simply no public interest reason now to warrant even giving serious consideration to allowing the Channel 6 station to operate at short spacings. Three commercial and one educational VHF channels are now in operation at Miami. WCIX-TV is authorized to operate at South Miami on Channel 6. WGBS-TV, Channel 23, is about to return to the air, and an application for a new station on Channel 39 is pending. The Commission assigned Channel 6 to the Miami area in the first place largely because it

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<sup>1/</sup> Even in 1957 and 1958 the Commission was unprepared to sanction a short spacing.

feared UHF would not be utilized successfully to provide additional service. UHF was then at its lowest ebb. Since then, of course, Congress has passed the all-channel receiver legislation and UHF development is progressing -- in Miami in particular. Since the major premise for making the Channel 6 allocation itself has disappeared, certainly there would now be no basis for the Commission to be willing to consider short spacings -- an approach it was unwilling to follow even when the major premise existed.

24. The fact is that grant of WCIX-TV's application for a short-spaced VHF station could have a substantial adverse impact on UHF development -- a development the Commission has been seeking to foster for more than a decade. Service from Channel 6 in violation of the Commission's mileage separation rules would clearly have adverse impact on authorized and applied for UHF stations in Miami<sup>1/</sup> and Fort Lauderdale<sup>2/</sup> and would discourage use of vacant UHF allocations.<sup>3/</sup> Since WCIX-TV is not affiliated with a network, it would be expected to seek to attract the particular types of advertisers and viewers that would be sought by the UHF stations.

25. While such impact from VHF stations operating in full compliance with all the Rules is contemplated by the VHF and UHF stations side-by-side approach of the All-Channel Receiver Legislation, the Commission and the courts

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- 1/ WGBS-TV is authorized on Channel 23 at Miami and Channel 39 is applied for.
  - 2/ WSMS-TV is authorized on Channel 51 at Fort Lauderdale.
  - 3/ Vacant non-reserved UHF Channels 33 and 45 are allocated to Miami.

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have made clear that such impact is contrary to the public interest when caused by a station operating in violation of the Rules. Louisiana Television Broadcasting Corp. v. FCC, 347 F.2d 808 (D.C. Cir. 1965); VHF Drop-Ins, 25 R.R. (1963); Atlantic Telecasting Corporation (WECT), FCC 66-307 (April 18, 1966) pages 3-4. Moreover, unreserved UHF Channels 25 and 53 are assigned to West Palm Beach, and grant of the short spacing WCIX-TV seeks would in like manner be expected to jeopardize future utilization of these UHF channels. Thus, apart from the lack of showing in support of the requested waiver, grant of the WCIX-TV proposal with its threatened adverse impact on UHF would be at odds with the aim of the all-channel receiver legislation and wholly inconsistent with the past Congressional and Commission policy determinations and decisions.

IV. PROPOSALS BY WDBO-TV AND WCIX-TV TO AFFORD ALLEGEDLY "EQUIVALENT PROTECTION" TO THE PRESENTLY AUTHORIZED FACILITIES OF THE OTHER DO NOT JUSTIFY WAIVER OF THE MILEAGE SEPARATION REQUIREMENTS.

26. WDBO-TV and WCIX-TV each alleges that it would afford the presently authorized facilities of the other "equivalent protection," as defined for purposes of Docket No. 13340. However, these allegations, even if technically correct, in no way support their requests for waiver of the mileage separation requirements.

27. The decision in Docket No. 13340 was limited to the question of the further consideration to be given to short-spaced VHF assignments in situations "where there is the most pressing urgency for the addition of a third service in major markets." Interim Policy on VHF TV Channel

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Assignments, 21 R.R. 1695, 1696 (1961). Of course, neither WDBO-TV's nor WCIX-TV's proposal involves bringing a third service to a market.

28. On reconsideration the Commission stressed the fact that "except in limited and unusual circumstances, the Commission has firmly adhered to its spacing rules." 21 R.R. at 1710c. It emphasized that its "decision in this proceeding should not be considered a general departure from the spacing requirements or an indication that we will look favorably on other proposals which suggest assignments at less than the minimum separations provided for in the rules." Ibid. And the Commission affirmed "that while we are prepared to make substandard assignments to the [eleven] named cities, a strict limitation upon the number of such

assignments must be maintained. Otherwise, the danger of a mass proliferation of short-spaced assignments would threaten -- without concomitant benefit -- the wide range of existing service . . . ." 21 R.R. at 1710c. Thus, the Commission narrowly limited the scope of further consideration of short spacings under the "equivalent protection" concept. 21 R.R. at 1699-1700.

29. That the decision in Docket No. 13340 did not make the concept of "equivalent protection" generally available to proponents of short-spaced assignments has since been emphasized by the Commission:

" . . . the Commission, in the course of the proceedings in Docket No. 13340, repeatedly emphasized the fact that the use of the equivalent protection technique would be strictly limited to a few selected markets . . . ." Capital Cities Broadcasting Corp., 24 R.R. 675, 680 (1962).<sup>1/</sup>

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<sup>1/</sup> Although the Commission subsequently permitted short spacings at Albany, it did not expand the intended scope of  
(Footnote continued on next page)

And again:

"In view of the limitations inherent in such a technique [equivalent protection] which necessarily limits its use only to exceptional cases, the Commission . . . [selected] a group of markets in which use of the 'squeeze-in' procedure would be considered." New Orleans Television Corp., 23 R.R. 1113, 1115 (1962).



As neither Orlando nor Miami was among the markets named for short spacing in Docket No. 13340, neither WDBO-TV nor WCIX-TV could properly seek to justify its short spacing proposal even by showing that it meets the "equivalent protection" requirements formulated for the markets named for short spacing in Docket No. 13340. WDBO-TV and WCIX-TV apparently recognize this point for they do not seek to argue explicitly, as some petitioners for waiver have argued, that Docket No. 13340 is a precedent for further waivers.

30. In Capitol Broadcasting Co. v. FCC, 324 F.2d 402, 403 (D.C. Cir. 1963), the Court of Appeals recognized that the applicability of the Docket No. 13340 "equivalent protection" concept was sharply limited when it pointed out that the "Commission determined in Docket No. 13340 to consider waiver of the minimum spacing requirements in certain localities under stated conditions and by application of specific criteria." [Emphasis added.] Thus, even if WDBO-TV or WCIX-TV were to be permitted to use the "equivalent protection" concept, the license of the other would be

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Footnote Continued.

the use of "equivalent protection." See Van Curler Broadcasting Corp., 24 R.R. 1079, 1082 (1963). Rather, it candidly made exceptions for Albany, because of very unusual circumstances, which it said "will not and should not be considered as precedent for other departures from the usual spacing requirements." Capital Cities Broadcasting Corp., 24 R.R. 1067, 1073 (1963). [Emphasis added.]

modified by the short spacing, notwithstanding Capitol Broadcasting Co. v. FCC, 324 F.2d 402 (D.C. Cir. 1963). It follows, of course, that if both stations were permitted to use this concept, the licenses of both would be modified.

31. Misreading of Docket No. 13340 poses the threat of "danger of a mass proliferation of short-spaced assignments" which so concerned the Commission in connection with Docket No. 13340. 21 R.R. at 1710a. Thus, at the present time VHF short spacing proposals, seeking to rely on the concept of "equivalent protection," are pending for such communities as Largo (Tampa/St. Petersburg), Florida, Waterloo, Iowa, Baton Rouge, Louisiana, and Minneapolis, Minnesota, none of which was named in Docket No. 13340. To avoid risking in television the chaotic AM situation that resulted from case-by-case departures from engineering standards, the Commission should, as MST has consistently urged, deny the various requests for waiver of mileage separation requirements and in doing so reaffirm in the most emphatic manner possible that short spacings -- whether by so-called "move-ins" or by so-called "drop-ins" -- are not consistent with national television allocations policy and that the mileage rules will be adhered to.

32. Moreover, neither the proposal of WDBO-TV nor the proposal of WCIX-TV is technically adequate to assure that the antenna it proposes would in fact afford

the "equivalent protection" each proposes to afford to the other. In each instance, the station proposes to rely on the directivity of its existing transmitting antenna to reduce the radiation toward the other. However, the type

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of transmitting antenna each proposes is a non-directional antenna.

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V. IF THE COMMISSION DOES NOT  
SUMMARILY REJECT EACH PROPOSAL,  
IT CANNOT GRANT EITHER APPLICA-  
TION, OR BOTH, WITHOUT HEARING.

34. If the Commission, notwithstanding the foregoing, does not dismiss or deny each petition for waiver and dismiss each application, neither application, nonetheless, could be granted without a hearing. Louisiana Television Broadcasting Corp. v. FCC, 347 F.2d 808 (D.C. Cir. 1965). As the Court pointed out there, when an application presents "significant policy issues . . . it is plainly improper to grant [it] without the full record of facts and adversary views a hearing would provide." 347 F.2d at 810. The WDBO-TV application presents no less than three of the "significant policy issues" set out in Louisiana Television -- first, whether the public interest warrants degradation of service set forth in Paragraph 17 hereof; second, whether the public interest justifies a waiver of the required minimum co-channel

mileage separation requirements; and third, whether grant of the application would violate the Commission's policy of encouraging the development of UHF channels. The WCIX-TV application presents two of the "significant policy issues" set out in Louisiana Television -- first, whether the public interest justifies a waiver of the required minimum co-channel mileage separation requirements; and second, whether grant of the application would violate the Commission's policy of encouraging the development of UHF channels. With respect to the short separation issue, in particular, the status of WCIX-TV is strikingly similar to the proposal in Louisiana Television in that in

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connection with each the Commission had previously decided on more than one occasion that the particular channel involved was not to be used at short separations. In such circumstances, it is particularly inappropriate, if not erroneous, for the Commission subsequently to grant summarily a short separation on that very channel.

#### VI. COMMON ALLOCATIONS QUESTIONS.

35. The foregoing has demonstrated that neither WDBO-TV nor WCIX-TV should be permitted to move to the site it proposes so long as the other remains at its present site. The foregoing also shows that so far as it now appears either station, or both, could nevertheless still change site, if desired, to a site meeting all mileage

separation requirements since there are alternative areas available meeting mileages in both the Miami and Orlando areas. Moreover, these areas remain available, although reduced in size, even if one or the other, but not both, should move to the site it proposes. However, if one of the two stations should so move, the other then would be required to move also, to a site which (1) meets mileage requirements to the new site of the first station, and (11) meets all other mileage separation requirements.

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#### The WCIX-TV Proposal

The WCIX-TV application requests modification of construction permit so as to specify a new transmitter site approximately 17.1 miles generally west of the presently authorized transmitter site on Ragged Key. The distance from the presently authorized site to the S. Miami reference point is 13.9 miles. From the proposed site, the distance is 15.8 miles. From the presently authorized facilities, WCIX-TV would place a city grade signal over all of South Miami, the city grade contour would include approximately 85 per cent of the city of Miami, and the Grade A contour would include all of the city of Miami.

Map 5 of this report shows the presently authorized and proposed WCIX-TV transmitter sites and, in addition, shows the area within which the WCIX-TV transmitter could be located in full compliance with the minimum mileage separation requirements. There

is also shown the requirement for maintaining the 220-mile separation from the site proposed in the pending WDBO-TV application. There are also shown on Map 5 the locations within this area in which the required city grade signal (74 dbu) could be delivered to all of Miami with various effective antenna heights.

Under the WCIX-TV proposal, the WCIX-TV Grade B contour would be extended substantially toward West Palm Beach, Florida, where commercial UHF Channels 25 and 53 are assigned. The distance from the West Palm Beach reference point to the WCIX-TV presently authorized Grade B contour is 24 miles, whereas this distance would be reduced to 15 miles if the WCIX-TV application should be granted.

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#### General

Both the WDBO-TV and WCIX-TV applications suggest use of the concept of mutual "equivalent protection" as that concept was advanced in the Commission's Docket No. 13340. In both instances, the stations propose to rely on the directivity of the transmitting antennas for the purpose of reducing the radiation toward the other station in an attempt to provide "equivalent protection".

It should be noted, however, that although both applicants rely on transmitting antenna directivity, the type of transmitting antenna proposed (both applications propose a standard G.E. type TY-60-F antenna) is a non-directional antenna. In view of the fact that these antennas fall within the definition

established by the Commission's Rules of non-directional antennas, there has been virtually no measurement of the transmitting antenna patterns of these antennas in actual practical operation. Thus, little, if any, data are available to determine whether the actual operating patterns of these "standard" antennas are in close agreement with calculated patterns and those measured in test ranges by the manufacturers.

Actually, neither applicant proposes to establish the actual radiation patterns of the antennas, notwithstanding the recommendations of the Television Allocations Study Organization (TASO) relative to the necessity for the employment of reference antennas and proof of performance field strength measurements to establish the radiation patterns of television transmitting antennas in actual operation.

In the case of antennas defined as non-directional antennas,

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disparity from true non-directionality may be of little consequence and are rarely, if ever, ascertained in actual operation. Experience has shown, however, that antennas such as the antennas here proposed, which are of the batwing type, may experience departures from the normal phasing and power distribution patterns, which in turn will alter the radiation patterns. Moreover, these changes may occur without detection in routine operation. When it is intended to rely on a specified radiation pattern for protection to another station, it becomes important to assure that the intended pattern is, in fact, realized. Under these circumstances, adherence to the minimum recommendations of TASO is considered essential.



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Before the  
Federal Communications Commission  
Washington, D. C.

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MAY 12 1966

In re Application of

Coral Television Corporation  
WCIX-TV, South Miami, Florida

For Modification of Construction Permit

Before the Commission:

F.C.C.  
OFFICE OF THE SECRETARY

File No. BMPCT-6256

OPPOSITION TO PETITION TO DENY

Coral Television Corporation (Coral) respectfully submits this opposition to the petition to deny filed by Storer Broadcasting Company (Storer).

STORER LACKS STANDING

1. Pursuant to Commission action of December 17, 1965, (BMPCT-6178), Coral is presently authorized to construct the transmitter and antenna tower for its Station WCIX-TV, Channel 6, South Miami, on Ragged Keys Tract No. 3, Biscayne Bay. This site will permit Station WCIX-TV to place a city grade signal over approximately 89% of the Miami land area (BPCT-2493, Engineering Report). <sup>1/</sup> Coral's application to modify its construction permit and move to this site was filed on October 29, 1965. Storer filed no objection to it.

2. On February 2, 1966, Coral filed an application for Commission authority to change the location of the WCIX-TV main studio and specify a main studio location in the City of Miami. Again no objection was filed by Storer and the change was authorized by the Commission (BPCT-2493, March 24, 1966).

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<sup>1/</sup> The site originally authorized for Station WCIX-TV would have permitted City Grade coverage over only 20% of the Miami land area.

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3. Coral's pending application would not significantly increase the competitive effect of Station WCIX-TV upon Storer if and when its proposed Station WGBS-TV, Channel 23, Miami becomes operational. The present Coral application will permit an improvement in the WCIX-TV City Grade signal in Miami by approximately 10% - from 89% coverage predicted from the Ragged Keys site now authorized, to 99% plus which would be supplied from the proposed new site near Homestead, Florida. This improvement is de minimus in terms of its potential competitive impact on other Miami stations.

4. It is clear that if Storer has ever experienced any genuine change in the competitive situation by virtue of WCIX-TV's proposed operation, this occurred in December, 1965, when the Commission permitted the modification of Coral's construction permit, to allow a site that improved the WCIX-TV signal strength in Miami to an extent that City Grade coverage was increased to cover an additional 70% of the area. Similarly, any objection Storer could have made to Coral's identification of WCIX-TV as a Miami station should have been made before the permittee was authorized to specify its main studio location in downtown Miami. It is idle for Storer to allege that Coral is now creating a new competitive threat justifying Storer's claim of standing. Storer has in effect slept on any rights it may once have had to raise this objection.

A GRANT OF CORAL'S APPLICATION IS IN THE PUBLIC INTEREST

5. Putting aside Storer's absence of legal standing in this proceeding, it is apparent that the foregoing discussion also disposes of Storer's claims that a change in the WCIX-TV transmitter site will "foreclose UHF development

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in South Florida" and provide Storer with a possible reason for avoiding resumption of WGBS-TV's operations.

6. Channel 6 has been allocated to Miami since 1957, and Storer has known from that time that it faced competition from a station operating on the channel. It has known, too, that this competition should (and could) in the Commission's judgment involve a fully effective utilization of the channel by provision of City Grade service to all of Miami. In the Drop-in proceeding which resulted in the assignment of Channel 6 to Miami,<sup>2/</sup> the Commission specifically stated that:

"... There is no doubt in our minds that the assignment of an additional VHF channel to Miami is necessary to provide greater opportunities for television growth and for comparable and effective competition among stations in the area so as to insure more and better television service to the public."  
(15 RR 1642a, 1642c).

And in its decision making the assignment, the Commission made it very clear that it anticipated the possibility that full City Grade service would be supplied to Miami on Channel 6. 15 RR 1638a, 1640.

7. Despite the recent developments outlined above, whereby Coral has already sought and received authority to operate from a main studio located in downtown Miami, and to provide City Grade service to 89% of the Miami land area, Storer has never heretofore raised the spectre of UHF hardships in connection with the alleged "impact" of Station WCIX-TV. Thus, it is significant that subsequent to Coral's grant of December 17, 1965, permitting a change in site to Ragged Keys No. 3 (and for the first time making possible

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<sup>2/</sup> Miami Drop-in Proceeding, 15 RR 1638a (1957).

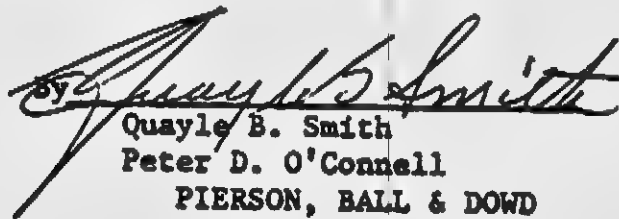
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City Grade service to 89% of the Miami land area), Storer filed with the Commission a request for authority to extend the period of construction for WGBS-TV, in which no mention was made of Coral's operation on WCIX-TV. Further, subsequent to the filing of Coral's request to specify a main studio location in Miami proper, Storer filed on February 21, 1966, an amendment to its request for an extension and again failed to even mention the "impact" on its plans which it now alleges is created by Coral's proposed operation. It appears, in short, that Storer's present concern for UHF survival in the face of competition from WCIX-TV is late in developing and very much in the nature of an afterthought. It is certainly clear that the signal improvement now being sought by Coral could not possibly have the adverse effects claimed by Storer, and will, to the contrary, fully implement the Commission's fundamental goals in assigning Channel 6 to Miami.

8. It is respectfully submitted that Storer's petition should be dismissed for lack of standing or, alternatively, denied for lack of merit.

Respectfully submitted,

CORAL TELEVISION CORPORATION

  
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May 12, 1966

ORIGINAL  
RECEIVED

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MAY 12 1966

F.C.C.  
OFFICE OF THE SECRETARY

In re Application of )

Coral Television Corporation )  
WCIX-TV, South Miami, Florida )

For Modification of Construction Permit) )

Before the Commission: )

File No. BMPCT-6256

OPPOSITION TO PETITION TO DENY

Coral Television Corporation (Coral) respectfully submits this  
opposition to the petition to deny filed by L. B. Wilson, Inc. (Wilson).

Preliminary Discussion

Wilson's petition to deny is defective in many fundamental respects.  
As the following discussion will make clear, Wilson does not have any bona  
fide competitive interest jeopardized by Coral's pending application to  
modify construction permit, and hence it has no standing in this proceeding.  
Moreover, the Wilson petition does not comply with the Commission's Rules  
since, contrary to the provisions of Sec. 1.580(i) of the Rules, Wilson has  
failed to set forth specific allegations of fact supported by affidavit.  
Wilson's petition is also founded upon a completely erroneous characterization  
of Coral's position in the Miami television market. Finally, Wilson has posed  
illusory "issues" respecting transfer of control and Coral's "reliability"  
which are wholly unsupported by material factual allegations, and do not  
warrant a hearing.

A. WILSON LACKS STANDING

1. Wilson cites two aspects of the Coral application in support of its claim of standing. First, it claims that by virtue of the pending application Coral is now moving to Miami "for the first time." This is not true as a matter of fact or law. As will be more fully developed below, the Commission's grant of a construction permit to Coral in April, 1964, was made on the basis of the applicant's definite intention to serve the entire greater Miami area. Thus, Coral has for two years presented a clear competitive threat to Wilson in the Miami market, and is not now in any sense entering that market for the first time. Wilson's position is incorrect as a matter of law because Coral is already authorized by the Commission to locate its main studio in downtown Miami and thus to identify itself as a Miami television station. Permission for Coral to change its main studio location was granted by the Commission on March 24, 1966 (BMPCT-6242).

2. Wilson also claims standing because the quality of Coral's signal over Miami would be improved through the requested change of antenna site. Wilson has made no threshold showing that the extent of this improvement would in fact have any competitive effect upon Wilson's operation. As a matter of fact, from the site already authorized for Coral's use WCIX-TV would provide Grade A television service to the entire City of Miami, and city grade service to 89% of the city area (BMPCT-6242, Engineering Statement). At the site for which authority is sought in Coral's pending application the city grade service would be extended to 99.89% of the land area of the City of Miami (BMPCT-6256, Engineering Statement). The relatively

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small quantitative improvement in service to these areas (which would receive service fully competitive with Wilson under the existing authorization) cannot be advanced as a substantial foundation for Wilson's standing, in the absence of any showing by that licensee of the precise manner that it would be competitively affected. Any legally recognizable injury to Wilson which could confer standing came about when Channel 6 was allocated to Miami in 1958 or when the original construction permit was granted in April, 1964; or when the modified construction permit was granted in 1965; or when authority was granted to Coral in March, 1966, for its Miami studio location. No new injury can possibly result from a grant of the instant application; accordingly, Wilson is now late in voicing its alleged grievance.

B. CORAL'S PROPOSED EXTENSION OF CITY GRADE  
SERVICE IS IN THE PUBLIC INTEREST

3. Wilson purports to find defects in Coral's application because of the "impact" that would be felt in the Miami television market by virtue of Coral's improvement in service. This contention, which is patently an effort to protect some fancied competitive interest that Wilson sees jeopardized, ignores completely the public interest in improving television service and in carrying out the expressed purposes of the Commission in originally allocating Channel 6 to Miami.

4. In 1957 the Commission concluded the so-called "Miami Drop-in" proceeding by assigning Channel 6 to Miami (15 RR 1638a). Pursuant to Sec. 73.606 of the Commission's Rules, the channel is still allocated to that



city. For reasons that will be discussed below, Coral's Station WCIX-TV has heretofore designated South Miami as its principal city to be served, despite the fact that its program structure has from the beginning been directed to the needs and interests of the entire greater Miami area.

5. In the Drop-in proceeding the Commission made it explicitly clear that the assignment of Channel 6 to Miami was being effected with express purpose of assuring Miami full city grade service from a fourth VHF facility. The Commission at that time stated:

" . . . There is no doubt in our minds that the assignment of an additional VHF channel to Miami is necessary to provide greater opportunities for television growth and for comparable and effective competition among stations in the area so as to insure more and better television service to the public."  
(15 RR 1642a, 1642c.)

6. In its decision in the Drop-in proceeding the Commission recognized that special problems were presented in the Miami area with respect to the location of a Channel 6 facility which would meet the technical requirements of the Commission's Rules, conform to aeronautical limitations on antenna height and still provide adequate coverage of Miami. But in urging the feasibility of Channel 6 service to Miami the Commission concluded: "The record demonstrates that a transmitter can be located in an area south of Miami from where the requisite minimum city grade signal could be placed over the city." 15 RR 1638a, 1640. The Commission noted that such a site would have to be in the area of Homestead, Florida. Ibid. This is the area where Coral now wishes to locate its transmitter and antenna. And the Commission stated that at some future time it might be necessary in a specific proceeding to determine, in the light of an actual proposal, whether the proposal could be granted

notwithstanding some deviation from the Commission's technical standards.

7. The Commission has thus demonstrated full awareness of the problems in locating a suitable antenna structure for Channel 6 which would permit optimum service contemplated by the assignment of that channel to Miami and still conform to FAA aerial navigation requirements. Because there has heretofore been no suitable site available that would meet this difficulty, Coral's original application specified a site south of Miami on one of the Ragged Key islands in Biscayne Bay, which would have provided a city grade signal over about 20% of the Miami land area. As noted above, the site presently authorized for construction - and located on another Ragged Key island - permits an increased tower height and city grade coverage over 89% of the Miami land area.

8. Until recently, WCIX-TV has had little or no encouragement in seeking permission to construct a tower on the mainland which would permit full utilization of the channel. However, late in 1965 the FAA indicated that taller towers in an area south of Miami would be feasible from an aeronautical standpoint. <sup>1/</sup> And on May 5, 1966, Coral's current proposal to locate its antenna tower in the Homestead area, with a tower height of 1,049 feet AMSL, was found by the FAA to be acceptable from an aeronautical standpoint (Notice of Determination of No Hazard, Study No. MIA-OE-66-19 (Amended)).

9. By operating from the proposed Homestead site WCIX-TV will provide city grade service to virtually all of the City of Miami, thus fully

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<sup>1/</sup> The full chronology of FAA meetings and other developments affecting Coral's efforts to provide full utilization of Channel 6 are set forth in the affidavit of Robert L. Johns, attached hereto as Exhibit 1.

qualifying the station as the fourth VHF outlet in Miami in full conformity with the Commission's objectives in allocating Channel 6 to Miami.

10. Wilson claims that Coral has not adequately shown financial qualifications to construct at the new site. A short answer to this is that such construction will be accomplished with substantially less cash requirement than would be the case on Ragged Key No. 3, where the station is presently authorized to construct. Nevertheless Coral proposes to supplement its pending application with an amendment to reflect further financial information.

11. Wilson makes the statement that Coral's programming was "designed to serve South Miami" and is not applicable to the "vastly different areas and populations" now to be served. It is difficult to conceive of a statement more thoroughly inaccurate and heedless of the facts than this one.

12. Beginning with its original application in 1958, Coral has consistently planned its programming with the intention of serving the local needs and interests of communities throughout the entire Miami area. Subsequent to the hearing on Coral's application the Hearing Examiner made a finding that its television service (like that of the other applicants) was designed for "the entire Greater Miami Area." <sup>2/</sup> All of its representations to the Commission have been directed to this goal. In its application for modification of construction permit filed on October 29, 1965 (BMPCT-6178) Coral set forth a 35-page survey report explaining in the greatest possible detail the efforts it has made to become fully and currently familiar with the

<sup>2/</sup> Publix Television Corp., Init. Decision, FCC 62-12; 13631, p. 4.

program needs and interests of persons living within the Grade B contour of WCIX-TV. The Grade B contour utilized for that study included 28 communities throughout Dade County, Broward County and Monroe County. This contour is not significantly different from the one that will be produced at the proposed Homestead site, in that the same communities will be covered in either event (compare BMPCT-6178, BMPCT-6256).

13. Coral's community surveys included interviews in Miami and in all of the 28 communities referred to above. They consisted of 580 door-to-door interviews by a special consulting firm and more than ninety personal interviews made by station personnel. In light of the breadth of these surveys, the detailed information they produced (see the report cited above) and the knowledge of community needs and interests which they furnished to Station WCIX-TV, it is frivolous to suggest that Coral has not complied with the precepts of Suburban Broadcasters, 20 RR 951 (aff'd. sub nom., Henry v. FCC, 302 F.2d 191 (U.S. App. D.C., 1962).

C. THERE HAS BEEN NO TRANSFER  
OF CONTROL OF CORAL

14. Wilson makes the charge that the original principals of Coral no longer own or control more than 50% of the company's stock, and that for this reason a de jure transfer of control has occurred. The charge is unfounded and apparently rests upon a mistake in analyzing the Coral ownership reports.

15. At the present time 60% of the Coral stock is in the hands of the original principals or members of their families. Of this amount 50.4% of the stock is directly voted by original stockholders, while 9.6% is voted by the spouses or children of such stockholders.

16. Wilson's erroneous tabulation of past and current interests showing a cumulative 43.4% interest in the hands of the original stockholders (Petition p. 6), overlooked the fact that Messrs. Leo Robinson and Norman Swetman, both original stockholders of Coral, continue to vote the 35 shares of Coral stock (7%) which they have placed in the hands of their respective children. Only by ignoring this circumstance (which was reported in Coral's ownership report filed on November 10, 1965) was Wilson able to allege that less than 50% of the stock interest was voted by original principals. Also, Wilson failed to note that the stock of Edward H. Hill, deceased, has been transferred in a technical sense only, in that it has passed to his son as Executor of Mr. Hill's Will. Moreover, a cumulative total of 3.6% of the Coral stock is held by the son of C. L. Clements and members of the family of W. Keith Phillips, both of whom are original stockholders of the company. There has obviously been no de jure transfer of control, and hence no need to file an application for Commission consent to such a transfer. The WHDH case (3 RR 2d 579), cited by Wilson in this regard, is completely inapposite. In that case the facts showed that more than 50% of the stock held by original stockholders had passed from their hands.

17. Solely by reference of a Stock Purchase Agreement entered into by Coral's stockholders and filed by Coral with the Commission's Ownership Section <sup>3/</sup> and without any factual support whatsoever, Wilson alleges that there has been a de facto transfer of control of the ownership interest in Coral. Wilson points out that pursuant to this agreement Mr. C. Terence Clyne and members of his family purchased 200 shares of stock in Coral.<sup>4/</sup> This stock was to be voted by Mr. Clyne and cumulatively provided a 40% interest in the company. The interest has subsequently been reduced to 35%, since on March 30, 1966, Mr. Clyne sold 25 shares (5%) to Mr. Hy Gardner and members of his family.<sup>5/</sup>

18. It is perhaps important to again emphasize that the Stock Purchase Agreement, which was fully and promptly reported to the Commission by Coral, is the sole foundation alleged for Wilson's serious charges regarding transfer of control.<sup>6/</sup> As will be seen, it is impossible to construe this agreement as a device for effecting a transfer of control.

<sup>3/</sup> A copy of the agreement was also filed in Coral's application for authority to modify construction permit, October 29, 1965 (BMPCT-6178, Exhibit D-2).

<sup>4/</sup> Mr. and Mrs. Clyne each acquired 50 shares and their two children received 50 shares apiece. No formal voting agreement has been entered into vesting voting rights for all of this stock in Mr. Clyne. The ownership file correctly reflects that Mr. Clyne will in practice vote the stock, however.

<sup>5/</sup> This stock was sold for the same price per share that Mr. Clyne originally paid for it. The transfer was reported on an ownership report filed April 11, 1966, to which no reference is made in Wilson's petition.

<sup>6/</sup> Inasmuch as the only "facts" cited by Wilson are its own tortured interpretations of the Stock Purchase Agreement, Wilson is really alleging here that the Commission has been delinquent in failing to recognize a prima facie transfer of control in an agreement that was fully disclosed to it.

19. Wilson lists various provisions of the agreement which it says "quite clearly" place control of Coral in Mr. Clyne's hands. Thus, Wilson equates "control" with Mr. Clyne's minority stock interest - a curious form of reasoning that Wilson understandably does not undertake to explain.<sup>7/</sup> It sees Mr. Clyne's "control" evidenced by his agreement to find bank financing for Coral, and by the fact that the Coral stockholders agreed to pledge their stock to secure such financing.<sup>8/</sup> It is submitted that Mr. Clyne's duty of finding bank financing for Coral is a normal and proper business assignment which in no sense reflects on the question of control. The fact that the Coral stockholders decided to pledge stock to secure such financing - retaining all of their voting rights in the stock - is similarly

<sup>7/</sup> Wilson refers throughout to Mr. Clyne's "40%" interest which should, of course, be 35% (combining his stock and that which he votes for his family). Wilson erroneously ignores Mr. Robinson's control over a total of 9% of the company in arguing that, except for Mr. Clyne, no other stockholder holds more than "6%" interest. Wilson misleadingly refers to Coral's "over twenty stockholders" by counting separately family members who do not vote any stock.

<sup>8/</sup> The stockholders executed "letters of consent" to having their stock pledged in line with paragraph 5 of their Stock Purchase Agreement. (BMPCT-6178, Ex. D-2). The letters of consent are in standard bank form. Mr. Clyne arranged for the First National Bank of Miami to make the loan in the amount of \$400,000. The Bank, having obtained adequate security through a collateralized guarantee of the loan from Mr. Clyne (pursuant to his obligations under the Stock Purchase Agreement), did not desire to escrow the Coral stock, which was placed, subject to the Bank's claim, in deposit with Mr. Clyne. The form of letter of consent has been filed with the Commission Ownership Section simultaneously with the filing of this opposition. It provides, inter alia, that all voting rights to the stock are retained by the pledgor and may not be assigned or transferred without the Commission's prior written approval, and that the pledgor retains the right of pro rata redemption as to repayment of the loan. The letters of consent were routinely entered into pursuant to the express terms of the Stock Purchase Agreement and the failure to file copies thereof with the Commission was wholly inadvertent.



a perfectly normal business transaction similar to pledges made by stockholders of innumerable Commission permittees and licensees as a method of obtaining needed financing.

20. In seeking to impugn the purpose and effect of the Stock Purchase Agreement Wilson resorts to an editorial device of very doubtful character; thus, it asserts that under the agreement "Mr. Clyne" acquired pre-emptive rights to Coral stock, "Mr. Clyne" acquired a right of first refusal, etc. The truth is, of course, that all of the Coral stockholders reciprocally "acquired" these various rights which, as the Commission knows, are routine provisions commonly used in closely held corporations to prevent dilution of interest and to assure stable ownership. They give Mr. Clyne nothing more than the other stockholders possess.

21. In the same vein, Wilson alleges that "Mr. Clyne acquired a right to block a sale of Coral's business." This too is misleading; the provision referred to permits any combined stock interest of 36% or more to prevent a sale. As pointed out above, Mr. Clyne currently holds voting control of a 35% interest only, and therefore he cannot "block" a sale of Coral's business as Wilson alleges. To the extent he once held such a right he has voluntarily divested himself of it - an action wholly inconsistent with Wilson's hypothesis.

22. Wilson purports to find in Mr. Clyne's right to name three of seven members of the Coral Board of Directors an element of "control." Since actions of the Board depend upon majority rule,<sup>9/</sup> and since Mr. Clyne's three

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<sup>9/</sup> By-Laws of Coral Television Corporation, Art. II, Sec. 4 (on file in the Commission Ownership Section).

appointees can be out-voted on every action considered by the Board, it is clear that this provision specifically prevents control by Mr. Clyne.

23. Mr. Clyne has been elected to the position of chairman of Coral's Board of Directors. This action was taken by a board which he in no sense "controlled" and it is certainly a valid and acceptable corporate appointment. Mr. Clyne is also executive director of Coral and thus holds a management position subordinate to the Board of Directors. He is responsible to the Board for all day-to-day activities in this position. It is submitted that there is no case in Commission history where occupancy of a board chairmanship and a corporate management position have been equated with de facto transfer of control.

24. The ingredient that is most notably missing from Wilson's petition is a showing of facts tending to support its allegations. In a petition to deny, the Commission rigidly requires "specific allegations of fact" supported by affidavits by persons with personal knowledge of the facts, or provable through official notice (Sec. 1.580(1) of the Commission's Rules). Wilson makes serious allegations but it cites no facts and has provided no affidavit referring to facts. The decided cases cited by Wilson emphasize the wide gulf between its naked assertions and cognizable allegations of fact.

25. Radio Associates, 21 RR 368, is not even remotely in point here because it does not deal with the question of transfer of control. The Commission's decision in that case, defining the role of a "principal" in an application, was based upon numerous facts - including the company's heavy indebtedness to the alleged principal (not indebtedness to a bank as

is the case here). In WWIZ, Inc., 2 RR 2d 169, the Commission found that a transfer of control had been made to a 45% stockholder which effectively formed the structure of the corporation, kept all of its books, provided its initial capital, and assumed full control of day-to-day financial affairs. None of these facts is present in this case.

26. Wilson's reliance on Elyria-Lorain Broadcasting Co., 6 RR 2d 191, is similarly misplaced. In that case - unlike the present proceeding - control over 50% of the licensee's stock had passed to third parties. However, of principal concern to the Commission were the facts that the alleged transferee corporation was the only local newspaper; that its president had also been president of the licensee for the past seven years, with powers over finances, employment, and programming; that none of the other stockholders had taken an active role in the licensee's affairs in recent years; and that a minority of the Board and a majority of the officers were associated with the minority holder. Cf. 6 RR 2d at 195-96. In the case of Coral, none of these factors is present except for minority representation on the Board of Directors.

27. Factual descriptions of the day-to-day operations of Coral are set forth in affidavits from Mr. Clyne, Mr. William A. Berns, Executive Vice President of Coral, and Mr. Robert L. Johns, Station Manager of WCIX-TV. These affidavits, attached hereto as Exhibits 1, 2 and 3, reflect many significant facts which demonstrate that the day-to-day control of Coral is held by the company's Board of Directors. For example, it is shown that Mr. Clyne lives and works in New York City; that he holds a full-time position with an advertising agency in that city; that Mr. Berns is responsible for

day-to-day Miami activities of the permittee under the supervision of Mr. Clyne as executive director, Mr. McAskill, president, and Mr. Robert Peterson, secretary, and acting at all times within the terms of policies laid down by the Board. The affidavits show further that all important policy decisions affecting the permittee's business activities have been specifically approved by the Board of Directors, and that the execution thereof has been supervised and governed by the Board. <sup>10/</sup>

28. It is submitted that, in the light of the facts reflected in the attached affidavits, and the total absence of factual support for Wilson's allegations, there is no ground for questioning the fact that de facto control of Coral is held by the Board of Directors - and ultimately by the stockholders of the company.

D. NO ISSUE EXISTS REGARDING CORAL'S  
READINESS TO CONSTRUCT

29. Wilson contends that because Coral has in the past been unavoidably delayed in resolving the problem of locating an antenna site that would provide fully effective service to Miami, the permittee should now be disbelieved insofar as it affirms that, having found such a site, it desires to construct Station WCIX-TV and go on the air at the earliest possible moment. Wilson seeks to have the Commission believe, in the face of massive evidence to the contrary, that Coral will for some undefined reason fail to construct its station.

<sup>10/</sup> It may be noted that before the Stock Transfer Agreement of October 14, 1965, was approved by the Coral Board of Directors, the Board received the advice of its Washington communications counsel to the effect that no transfer of control was involved. See Exhibit 3, pp. 3-4.

30. Before alluding to the specific circumstances that have plagued Coral in its efforts to construct Station WCIX-TV, it is perhaps useful to underscore the absurdity of Wilson's "issue" by considering the financial implications of the attitude that Wilson is inferentially ascribing to Coral. Thus, among other things, Coral has incurred some \$437,000 in preoperation expenses, including \$64,000 in fixed station assets, \$109,000 as down payments on equipment contracts involving commitments substantially in excess of \$1,000,000, and purchase of a \$190,000 mobile video tape unit which is now in use. In addition, Coral has hired several currently-salaried staff personnel; leased transmitter property; secured downtown studio space; and begun program production. Also, in connection with its outstanding lease for Ragged Key No. 3, Coral is obligated to pay a rental of \$1,500 per month for a minimum period extending until January, 1968.<sup>11/</sup> It is simply incredible for Wilson to suggest that a broadcast company with these financial commitments and mounting stand-by expenses does not really intend to construct and go on the air at the earliest possible moment, but rather secretly intends to court delay so that it may indefinitely maintain a profitless existence.

31. In considering Wilson's argument it is obviously necessary to place in proper context the representations made by Coral, the final Commission grant to Coral, and the events which occurred subsequent to that grant. Wilson manages to confuse these elements by referring to Coral's plans made in "early 1958" as if Coral were somehow responsible for a failure to construct even prior to the time that decision of the Commission was issued in April of 1964.

<sup>11/</sup> See Exhibit 1, p. 5, and Exhibit 3, p. 4, attached hereto.

32. The Commission is well aware of the continuing and complicated problems that Coral has encountered in seeking to provide effective service to Miami while at the same time satisfying FAA requirements with respect to aeronautical limitations on tower height, adhering to local zoning and municipal building rules, and observing the limitations imposed by the 220 mileage separation requirement with respect to Station WDBO-TV, Orlando. Although the Commission files contain abundant explanation of the problems Coral has encountered, Wilson makes no effort to portray this information or even allude to it.

33. The affidavit of Mr. Robert L. Johns, Vice President of Coral, (Exhibit 1 hereto) describes the company's efforts to resolve the transmitter site and antenna difficulties encountered in the 24 months that have elapsed since the grant of its application. As will be seen, these problems have been substantial.

34. Contrary to Wilson's charges, it is apparent from the facts described by Mr. Johns that the corporation has made a tremendous effort to construct its station at the earliest possible date. However, many unanticipated obstacles have frustrated the station's efforts, as indicated in the following synopsis of the chronology in this matter:

(a) During the time that Coral's application was pending before the Commission (1958-1964) changes occurred in the status of its proposed site in the Ragged Keys area. This section became incorporated as a separate municipality ("Islandia"). After its grant Coral sought land space in the Keys which would permit

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increases in antenna height without requiring construction over water. A move from Ragged Key No. 2 to Key No. 4 was proposed for this purpose, and permission therefor was sought in an application filed on August 26, 1964 (BMPCT-6004).

(b) The application to modify construction permit was granted by the Commission on October 26, 1964. Thereafter the permittee obtained necessary water rights off Ragged Key No. 4 and ordered drawings to be prepared for its transmitter building on that site. The drawings were completed and bids for construction were received and compiled. At that point in time Islandia unexpectedly and abruptly revoked the Coral building permit for this site.

(c) Throughout this entire period Coral was constantly seeking to find a mainland site that would not involve aeronautical or mileage separation problems. No such site could be found but a site that involved a slight waiver of the separation rules was located and placed under lease in December, 1964. An application to build a 1,749 foot tower at this site (in an area called Biscayne Flats) was prosecuted before FAA authorities.

(d) While the FAA was considering the 1,749 foot tower proposal, a site on Ragged Key No. 3 was offered to Coral. Coral made firm arrangements to build on Ragged Key No. 3 when the FAA informally indicated that it was preparing an antenna farm proposal for the Miami area, and that the 1,749 foot tower would conflict with this proposal.



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(e) Coral proposed a 549 foot tower on Ragged Key No. 3, and it was necessary to secure FAA approval for this height. Such approval was issued in May, 1965. Zoning approval from the City of Islandia was also needed, and was finally granted on September 7, 1965. By October 27, 1965, Coral had ordered its proposed tower for delivery and received construction bids. An application for modification of construction permit was filed with the Commission on October 29, 1965, to specify the site on Ragged Key No. 3. An amendment to this application reflecting equipment changes was filed on December 6, 1965. The Commission granted the application on December 17, 1965.

(f) Beginning in December, 1965, Coral received indications that the FAA was considering the possibility of establishing an antenna farm area in the vicinity of Homestead, Florida. For the first time since Channel 6 was assigned to Miami it became possible for the permittee to anticipate prompt and favorable FAA action on a tall tower in the Homestead area - making it feasible for city grade service to be provided to all of the Miami city area. On January 12, 1966, Coral sought FAA approval for a 1,049 foot tower at Homestead. The FAA has granted this approval. The Coral application now pending before the Commission seeks a modification of its construction permit to move to this site.

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35. It is submitted that the foregoing sequence of events demonstrates very persistent efforts by Coral to improve the prospects for effective service to the public in the Miami area. Events over which Coral has had no control, coupled with the necessity of securing legal clearances from a variety of municipal and federal agencies, have introduced delays; but in none of these situations has there been any intention on Coral's part to vary from its representations that it desires to implement service on Channel 6 as quickly as possible.

36. Wilson's contention that Coral cannot be relied upon to perform its promises is clearly a makeweight argument, advanced by a competitor whose sole interest lies in frustrating the realization of those promises.

#### E. OTHER MATTERS

37. Wilson suggests that it "might" be appropriate for the Commission to order for hearing on issue regarding "reporting violations" in the filing of Coral's ownership reports. In this regard Wilson inaccurately states that all of Coral's ownership reports have been "tardy in at least one respect."

38. It has been noted that Coral did not file copies of its stockholders' letters of consent to pledge of their stock. This form was effectively made known to the Commission through the filing of the Stock Purchase Agreement discussed above, but it has now been submitted in specie.

39. The ownership report filed by Coral on April 11, 1966 was timely in all respects. The company's report submitted on December 21, 1965 was

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four days late.<sup>12/</sup> The company's report of November 10, 1965 was timely in all respects; however, mentioned in the report was the death of Edwin H. Hill on February 15, 1965 and the transfer on October 14, 1965 of stock passing to his executor. The death should have been reported prior to March 17, 1965. Coral's first ownership report after its grant of April 29, 1964, was dated May 28, 1964 and filed June 29, 1964.

40. The foregoing summarizes precisely the so-called "violations" that Wilson very broadly alleges. They obviously represent the consequence of minor delays in assembling accurate information, preparing, signing and mailing forms, or, at the very worst, an administrative oversight. There is not the slightest basis for any inference that Coral sought to conceal information or that it has failed to deal with the Commission in complete candor. The Commission is aware that occasional oversights or delays such as those described above are not easily avoided by an active permittee or licensee. Wilson itself is very well-versed in this problem: in Wilson's most recent renewal proceeding (L. B. Wilson, et al., Docket No. 14775), a Commission Hearing Examiner found that Wilson had failed to properly amend its application to reflect changes in ownership, and that two stock transfers were not properly reported to the Commission through appropriate ownership reports. Initial Decision, FCC 63D-147, pp. 13-14 (1963). The infractions were excused in Wilson's case because they were found to be "inadvertent." Ibid.

#### Conclusion

The history of Coral's hard-fought efforts to provide fully effective television service to Miami has now reached a stage of critical importance

<sup>12/</sup> Stock transfers reported in this report, which occurred on November 11, 1965, were not finally approved by the Coral Board of Directors until November 18, 1965.

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to the permittee, and to the sizeable public it desires to serve. For the first time complete city grade service in Miami is definitely possible on Channel 6. Coral has already invested in its construction efforts large amounts of money and innumerable hours of labor by its officers and stockholders. Every hour of delay in beginning the construction of WCIX-TV unnecessarily increases costs without bringing needed service to the public. For these reasons Coral urges that its pending application be granted at the earliest possible moment.

A grant of the application will clearly be in the public interest, and will fulfill the Commission's expressed goals when it allocated Channel 6 to Miami.

Wilson's interest as licensee of a competing Miami station obviously lies in obstructing the progress of WCIX-TV. The unfounded and exaggerated charges set forth in Wilson's petition amply demonstrate that Wilson has appeared in this proceeding only to protect its selfish interests, and not to see the public interest advanced. The Commission should not permit its processes to be used for this purpose; accordingly, the Wilson petition should be dismissed for failure to comply with Sec. 1.580(i) of the Commission's Rules (requiring specific and supported allegation of fact) or, alternatively, it should be summarily denied.

Respectfully submitted,

CORAL TELEVISION CORPORATION



Thomas N. Dowd  
Quayle B. Smith  
Peter D. O'Connell  
PIERSON, BALL & DOWD  
1000 Ring Building  
Washington, D. C. 20036  
Its Attorneys

May 12, 1966

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Before the  
Federal Communications Commission  
Washington, D. C.

In re Application of

Coral Television Corporation  
WCIX-TV, South Miami, Florida

For Modification of Construction Permit

Before the Commission:

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File No. BMPCT-6256

AFFIDAVIT OF ROBERT L. JOHNS

I, Robert L. Johns, being first duly sworn do hereby depose and say as follows:

1. I am the same Robert L. Johns who is a stockholder of Coral Television Corporation, a Florida corporation (hereinafter referred to as Coral) which is permittee of Television Station WCIX-TV, Channel 6, South Miami, Florida. I am also Station Manager of Station WCIX-TV.

2. I am giving this affidavit with the intention that it shall be incorporated as a part of Coral's "Opposition to Petition to Deny" - a pleading to be filed before the Federal Communications Commission (hereinafter referred to as Commission).

3. I am personally familiar with all of the actions taken by Coral in its efforts to locate an acceptable transmitter and antenna site for the proposed operation of Station WCIX-TV. Commencing with the permittee's early investigation of this subject prior to the filing of its application for Channel 6 in 1958, and continuing to the present, I have devoted substantially all of my time to getting the station readied for operation. I have been personally involved in and principally responsible for the many negotiations that have been required in connection with the location of a suitable site.

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4. There is set forth below in chronological order a summary description of the various events and circumstances which have affected Coral's plans to construct Station WCIX-TV.

April 23, 1958-  
April 29, 1964

During this period the Coral application was pending before the Commission. During the pendency of the application Coral's proposed transmitter site on Ragged Keys Tract No. 2 (approximately 8 miles offshore Southeast of Miami and to the east of Goulds, Florida) was made a part of the incorporated city of Islandia and for the first time became subject to municipal regulations on zoning, building permits, etc.

April 29, 1964-  
August 26, 1964

Coral determined that the site at Ragged Keys No. 2 would not provide sufficient available land area for future increases in antenna height, and on August 26, 1964, application was made to the Commission to modify the Coral construction permit to move the site to Ragged Keys No. 4. The height of the antenna was to remain at 339 feet AMSL. No significant change in service contours was involved.

In July and August, 1964, test borings were made at Ragged Keys No. 4 and construction drawings were prepared and submitted to the Corps of Engineers for approval of the water site.

August, 1964

Architect drawings for studio were submitted.

September 11, 1964

Engineering drawings for construction on Ragged Keys No. 4 were submitted in completed form.

September 30, 1964

The owner of Ragged Keys No. 3 protested to the Corps of Engineers about Coral's site on Key No. 4. It then appeared that this protest would delay local zoning and/or building permit clearance, and Coral undertook extensive surveys to locate

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September 30, 1964	a site on the Mainland upon which construction could begin. Conflicts with FAA aeronautical requirements and with mileage separation rules involving Channel 5 in Palm Beach became the most difficult problems to resolve. Sites to the South of Miami involved aeronautical objections because of the proximity of Homestead Air Force Base and Miami International Airport traffic patterns.
September - October, 1964	Coral found a site on Biscayne Flats, four miles South of Key Biscayne, where antenna height of 1,500 to 2,000 feet seemed very feasible. Discussions with the FAA authorities were immediately begun with respect to this site.
October 10, 1964	The President of Coral appeared before Islandia City Council to request building authority on Ragged Keys No. 4.
October 26, 1964	Commission issued approval of the modification of CP to permit the move to Ragged Keys No. 4.
November 6, 1964	Construction plans on Key No. 4 were approved by the Islandia authorities, and a building permit was issued to Coral.
November 12, 1964	The Corps of Engineers requested that the Coral tower be moved 200 feet North. In November, 1964, Coral was also seeking authority for the Key Biscayne site.
November 16, 1964	New engineering drawings for the Key No. 4 site were submitted pursuant to the Corps of Engineers request.
December 8, 1964	Islandia revoked the Coral building permit on Key No. 4. Thereafter Coral leased land on Biscayne Flats for the proposed tall tower to be erected in that section.



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December 21, 1964	Formal notice of the Biscayne Flats proposal was submitted for FAA approval.
December 31, 1964	Engineering to support request for a 1,749 foot tower on the Biscayne Flats site was filed with the FAA.
January 19, 1965	Coral filed protest regarding withdrawal of permit for Key No. 4.
January 20, 1965	Zoning approval for the Biscayne Flats site was obtained from Dade County.
January 28-29, 1965	FAA held informal hearing in Atlanta which Coral attended. Discussion occurred regarding possible tall tower antenna farm to southwest of Miami. Coral learned that licensee of Channel 5 in Palm Beach was planning to request 2,000 foot tower in Boca Raton.
January 31, 1965	Coral purchased additional land on Key No. 4. to cover possible denial of Biscayne Flats site.
February 9, 1965	FAA held hearing in Atlanta on Coral's proposed 1,749 foot tower.
February 10, 1965	State of Florida approved Coral's use of Biscayne Flats site.
February - March, 1965	Several informal discussions with the FAA revealed that the Agency intended to deny approval of the 1,749 foot height as being in conflict with its pending plans for overall antenna situation in Miami area. Coral was pressing FAA for action, due to its desire to begin construction as quickly as possible. FAA indicated that an increase of antenna height to 549 feet on Ragged Keys would probably not present hazards to aviation.

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February - March, 1965	Also in this period the owner of Ragged Keys No. 3 - who had opposed Coral's use of Key No. 4, offered Key No. 3 as site.
March 26, 1965	Coral's engineer was instructed to revise plans and change to 549 foot tower proposal.
March 30, 1965	549 foot tower request was filed with the FAA.
April 5, 1965	The FAA issued a Determination of Air Hazard concerning the 1,749 foot tower proposal.
May 5, 1965	Coral appealed the FAA Determination.
May - July, 1965	Coral staff designed new equipment and updated all areas of the WCIX-TV programming, engineering and film-buying plans.
May 12, 1965	FAA hearings were held on the 549 foot tower and the request of Station WPTV, Palm Beach for Boca Raton site.
May 21, 1965	FAA issued approval of Coral's 549 foot antenna proposal.
June 10, 1965	FAA issued a final Determination of Hazard regarding Coral's 1,749 foot antenna.
June 15, 1965	Coral secured tower bids from manufacturers on the 549 foot tower.
July 23, 1965	Coral signed a lease with owner of Ragged Keys No. 3 contingent upon zoning and building permit authority from Islandia. This lease commits Coral to monthly payments of \$1,500.00 for a minimum period extending until January, 1968.

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August 19, 1965	Coral sought speed-up of action on building permits and zoning for Key No. 3. Conferences held to prepare engineering for building and antenna.
August 20, 1965	Requests filed for Islandia permits for zoning and building on Key No. 3.
September, 1965	Coral's surveys of local program needs were made throughout the area of the station's proposed Grade B contour.
September 7, 1965	Islandia zoning hearing was held on the Key No. 3 site proposal.
September 12, 1965	Due to Hurricane Betsy (Sept. 7-9) revisions were made in building plans on Key No. 3.
September 27, 1965	Zoning resolutions were issued approving use of Key No. 3.
October 15, 1965	The transmitter for Station WCIX-TV was ordered and initial preparations were made to construct.
October 21, 1965	Request filed by Coral for Corps of Engineers approval of Ragged Key No. 3.
October 29, 1965	Coral submitted to the Commission an application for modification of its construction permit reflecting the new transmitter location on Ragged Key No. 3.
November 10, 1965	Submission of further data to Corps of Engineers for approval of site on Key No. 3.
November 18, 1965	Corps of Engineers issued approval.

December 10, 1965  
Commencement of FAA hearings on proposed increase of height by Station WPTV, Palm Beach, Florida. At this meeting it developed that the FAA was giving favorable study to the possibility of suggesting antenna farms in the Miami area, including the possibility of a farm area south of Miami near Homestead. The final FAA proposal was scheduled for issuance in early January, 1966.

December 14, 1965  
The Dade County Board of Commissioners adopted a resolution supporting the establishment of the Islandia area as a national monument.

December 14, 1965  
Coral invited bids from seven construction firms for work on Ragged Key No. 3 transmitter site.

December 15-22  
1965 (approx.)  
Informal meetings were held with FAA personnel in an effort to resolve questions about the possible antenna farm proposal. Also, increasing amounts of information were published locally concerning the likelihood that the Ragged Keys might be converted into a national monument with private property to be acquired by the U. S. Department of the Interior. Coral continued to be highly interested in moving to an antenna farm area, particularly in the light of the pending plans for Islandia.

December 17, 1965  
The Commission granted Coral's Oct. 29, 1965 application for modification of construction permit (Ragged Key No. 3).

January 10, 1966  
Coral's aeronautical consultant advised the company that FAA plans might include provision for an antenna farm to the South of Miami.

January 12, 1966  
Coral filed with the FAA a notice of proposed construction of an antenna tower in the Homestead area South of Miami, height to be 1,049 feet AMSL.

January 15 and  
18, 1966  
Further reports were published in the Miami Herald regarding pending surveys of Islandia for acquisition as a national monument, and concerning Secretary Udall's plans for this monument.

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February 2, 1966 Coral filed with the Commission an application for authority to change the location of the main studio of WCIX-TV to downtown Miami. Also, Coral's engineer was instructed to prepare engineering data for the Homestead site as soon as possible.

February 16, 1966 An informal FAA airspace meeting was held with reference to Coral's Homestead proposal.

March 14, 1966 Coral received the engineering data for its proposed application to modify construction permit in regard to the Homestead site.

March 15, 1966 Application was filed with the Commission for authority to modify construction permit to specify the Homestead site and an antenna height 1,049 feet AMSL.

March 24, 1966 Coral's application to change the WCIX-TV studio location to downtown Miami was granted by the Commission.

April 11, 1966 Coral received informal notice that the FAA had made a determination of no hazard as to the pending Homestead antenna proposal for a tower of 1,049 feet AMSL.

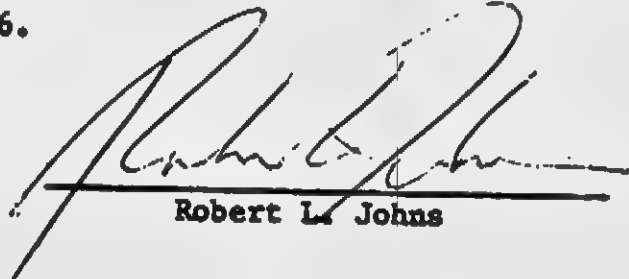
April 13, 1966 A zoning hearing was held by Dade County officials and zoning approval was issued for the WCIX-TV Homestead site.

May 5, 1966 The FAA issued its Determination of No Hazard regarding Coral's proposed Homestead antenna tower.

5. With reference to the progress of construction, during the period March 15, 1966 to present Coral has ordered its tower and technical equipment, completed civil engineering surveys and test borings, leased studio and transmitter properties, secured local zoning and building permits and moved into downtown studio space. In addition, the permittee has made operational a mobile

video tape and color recording unit - to the best of my knowledge, the only one of its kind in the State of Florida.

Dated this 9th day of May, 1966.

  
Robert L. Johns

Subscribed and sworn to by Robert L. Johns before me HELEN  
A. WISHER, a notary public in and for the District of Columbia,  
this 9th day of May, 1966.

  
Notary Public

My Commission expires: 10/31/68

CLYNE MAXON, INC. ADVERTISING

THE PENNEY BUILDING - ROCKEFELLER CENTER - NEW YORK, N. Y. 10019

C. TERENCE CLYNE  
PRESIDENT

Exhibit 2

Before the  
Federal Communications Commission  
Washington, D. C.

In re Application of )  
Coral Television Corporation )  
WCIX-TV, South Miami, Florida ) File No. EMPCT-6256  
For Modification of Construction Permit )  
Before the Commission: )

AFFIDAVIT OF C. TERENCE CLYNE

STATE OF NEW YORK, SS:

I, C. Terence Clyne, being first duly sworn, do hereby depose  
and say as follows:

1. I am the same C. Terence Clyne who is a 5% stockholder and chairman of the board of directors of Coral Television Corporation, a Florida corporation (hereinafter referred to as Coral) which is permittee of Television Station WCIX-TV, Channel 6, North Miami, Florida.

2. I am giving this affidavit with the intention that it shall be incorporated as a part of Coral's "Opposition to a Petition to Deny" - a pleading to be filed before the Federal Communications Commission.



C. TERENCE CLYNE

3. I am president of Clyne Maxon, Inc., an advertising agency with offices at 1301 Sixth Avenue, New York, New York. Clyne Maxon, Inc. is a wholly-owned subsidiary of BBDO, and I serve as a director of the parent corporation. By contract I serve as the chief executive officer of Clyne Maxon and by virtue of my contractual obligations have primary responsibility for the direction and supervision of the activities of Clyne Maxon, Inc. This contract became effective January 1, 1966 and is to be continued for a minimum period of five years.

4. To the best of my information and belief, the contract of October 14, 1965, spelled out in detail my responsibilities and duties as executive director. I believe that these duties have been carried out in strict accordance with that contract.

5. Insofar as the purchase of stock in Coral Television is concerned, fifty shares were acquired directly in the name of my wife, Mrs. Terence Clyne, fifty shares each in the names of my two minor sons, Terence and Michael, ages 17 and 15 respectively, and fifty shares in my own name. As indicated in the original application, the shares of stock issued to my wife and sons were to be voted by me under a trust instrument which has not yet been executed, and

C. TERENCE CLYNE

said stock has not in fact been voted. Subsequent to my acquisition of fifty shares of stock, I sold twenty-five shares of stock to Mr. Hy Gardner, his wife and son, and this stock is free of any pledge or hypothecation and Mr. Gardner has full voting rights therein.



Subscribed and sworn to by C. Terence Clyne before me

Richard E. Freedman, a notary public in and for

Queens County, New York, this 10th day

of May, 1966.



Notary Public

RICHARD E. FREEDMAN  
Notary Public, State of New York

No. 41-6394785

Qualified in Queens County

Commission Expires March 30, 1968

My commission expires

Before the  
Federal Communications Commission  
Washington, D. C.

In re Application of	)	
	)	
Coral Television Corporation	)	
WCIX-TV, South Miami, Florida	)	File No. BMPCT-6256
	)	
For Modification of Construction Permit	)	
	)	
Before the Commission:	)	

AFFIDAVIT OF WILLIAM A. BERNIS

DISTRICT OF COLUMBIA  
CITY OF WASHINGTON, ss:

I, William A. Bernis, being first duly sworn do hereby depose and say as follows:

1. I am Executive Vice President and Managing Director of Coral Television Corporation (Coral), permittee of Television Station WCIX-TV, Channel 6, South Miami, Florida. I have served in these positions since January 1, 1966. As Executive Director of Coral, I have responsibility for implementing the policy and management decisions of the Board of Directors and directly supervising all of the day-to-day activities of the corporation and Station WCIX-TV. Under the established Coral corporate chain of command, I act under the supervision of, and report to, the Board of Directors through Mr. C. Terence Clyne, Executive Director of Coral. I consult regularly with Leon C. McAskill, President of the corporation and Robert C. Peterson, Secretary and local counsel of Coral, and with

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other stockholders of the company in areas where they are particularly knowledgeable - for example, I have recently consulted with Mr. W. Keith Phillips, Sr. in zoning matters and with Mr. Cameron Stewart on matters involving real estate.

2. My primary duties to date on behalf of Coral have been to negotiate for studio and transmitter locations, direct zoning requests in regard to the WCIX-TV transmitter site, supervise program plans and arrangements, represent the station in press relations, consult with the WCIX-TV national sales representative, and generally supervise the activities of Coral's present staff (comprising a total of 10 salaried employees including myself) in preparing for construction of Station WCIX-TV and laying plans for station operation upon the completion of construction. I am personally familiar with all of the day-to-day activities of Coral.

3. My employment with Coral was recommended to the Board of Directors by Mr. Clyne as Executive Director and was approved by the Board. Prior to the negotiations leading to my employment with Coral I had never met Mr. Clyne or had any business dealings with him.

4. I perform all of my duties subject to policies established by the Coral Board of Directors, and where matters of significance are concerned, such as leasing of studio space or other substantial financial commitments, it has been, and is, Coral's practice to have the Board of Directors consider and pass upon the action to be taken. Legal contracts and other documents requiring signature on behalf of the corporation are executed by Mr. McAskill and Mr. Peterson as President and Secretary, respectively,

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by me as Executive Vice President or by Mr. Clyne as Executive Director. Messrs. Robert L. Johns (WCIX-TV Station Manager) and Norman Swetman (Operations Manager), both of whom are Coral stockholders, work directly with me in full-time capacities for the Station. I consult with them many times every day regarding management problems. Also, I communicate orally and in writing to Messrs. McAskill, Clyne and Peterson concerning WCIX-TV activities. I am in contact with each of these three men at least once or twice a week to keep them advised and to seek their recommendations.

5. I have examined the corporate minutes which set forth the actions taken by the Coral Board of Directors. Based upon my inspection of the minutes (and upon my personal knowledge of Coral's operation) I am able to state that the Board has considered and acted upon such matters as the employment and salaries of the WCIX-TV chief engineer and managing director; the election of Coral's officers; the location of the WCIX-TV transmitter and studios; the terms of Coral's corporate borrowings from the First National Bank of Miami; the selection of a station business manager; the retention of a national sales representative; the delegation of responsibility to me for press relations; and various salary matters. In addition the minutes reflect that the Board has discussed and reviewed program policy and sales matters and construction problems. Also the Board acted upon the Stock Purchase Agreement dated October 14, 1965; in this regard the minutes of the Board's meeting on October 14, 1965, reflect that Coral's Washington communications counsel (then Mr. Joseph Kittner) was present at the meeting and that the Board received his legal opinion to the effect

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that execution and performance of that agreement did not involve a question of transfer of control.

6. Under my supervision Coral has taken many actions and incurred large financial expenditures and commitments in preparing to begin operation of Station WCIX-TV at the earliest possible date. It has leased property for its Homestead transmitter and antenna site; obtained (with considerable difficulty and expense) local zoning and building permits; secured FAA approval of its antenna height and location; moved into studio space in downtown Miami; contracted for programs; employed many staff members; ordered a 1,049 foot antenna tower; and contracted for technical equipment. The permittee has already spent \$437,000 for pre-operation costs, including \$64,000 paid out for fixed assets, \$109,000 deposited for other fixed assets (which involve a total commitment substantially in excess of \$1 million) and \$190,000 obligated for the purchase of a mobile tape unit. It is currently incurring overhead expenses at a rate of approximately \$15,000 per month.

Dated this 11<sup>th</sup> day of May, 1966.

William A. Berns  
William A. Berns

Subscribed and sworn to by William A. Berns before me HELEN A.  
WISHER, a notary public in and for the District of Columbia, this  
11<sup>th</sup> day of May, 1966.

Helen A. Wisner  
Notary Public

My Commission expires: My Commission Expires October 31, 1968.

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D. C.

RECEIVED

MAY 17 1966

F.C.C.  
OFFICE OF THE SECRETARY

In the Matter of  
the Applications of

THE OUTLET COMPANY  
WDBO-TV, Orlando, Florida

CORAL TELEVISION CORPORATION  
WCIX-TV, South Miami, Florida

For Construction Permits  
To Change Sites

File No. BPCT-3742

File No. BMPCT-6256

COMMENTS WITH REGARD TO  
OBJECTIONS OF ASSOCIATION OF MAXIMUM  
SERVICE TELECASTERS, INC.

1. Coral Television Corporation (Coral), permittee of WCIX-TV, South Miami, Florida, by its attorneys, respectfully submits the following comments on "Objections" raised by the Association of Maximum Service Telecasters, Inc. (MST) to petitions for waiver submitted in connection with the above-referenced application of Coral and of The Outlet Company (WDBO-TV).

2. Under the guise of an informal objection to the applications of WCIX-TV and WDBO-TV, who mutually agree to the de minimis short-spacing involved in the two proposals, <sup>1/</sup> MST asserts that the Commission should deny the parties' petitions for waiver and dismiss the applications or, alternatively, designate the applications for hearing. In view of the

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<sup>1/</sup> The two proposed sites are short spaced by only 5.6 miles.



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line of cases wherein MST has been denied standing as a party in interest,<sup>2/</sup> it is presumptive of MST to here assert statutory rights which do not run to it. Coral is aware that the Commission has allowed limited participation to MST in short-spaced proceedings. It is also aware that the Commission uniformly dismisses these objections for failure to present substantial and material questions of fact.<sup>3/</sup> The objections at hand fall squarely within this description and, accordingly, should be dismissed. Although Coral does not concede any rights to MST, the following is set out for the purpose of demonstrating the insubstantial nature of MST's objections.

3. In the interest of improving television service in their respective areas (which principle MST really should be supporting), WCIX-TV and WDBO-TV filed applications which propose sites 214.4 miles apart or only 5.6 miles short of the normal 220 mile separation for Zone III. Each of the applicants has submitted engineering proposals (WDBO-TV - BPCI-3742 and WCIX-TV - BMPCT-6256) wherein mutual protection on an equivalent distance basis is afforded and each agrees to a grant of the other's application.

4. The specification of the particular sites by the applicants was dictated by aeronautical considerations and after hearings before

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2/ New Orleans Television Corp., 23 RR 1114 (1962); St. Anthony Television Corp., 2 RR 2d 348 (1964); Peninsula Broadcasting Corp., 3 RR 2d 243 (1964) and Television Broadcasters, Inc., 4 RR 2d 119 (1965).

3/ See cases cited in Footnote 2.

the FAA, rulings of "no hazard" have been issued.<sup>4/</sup> The WCIX-TV site was selected in an area near Homestead, Florida, specified by the FAA as one which could be used to accommodate tall towers.<sup>5/</sup> The proposed site of WCIX-TV lies inside the southern boundary of this area. It is, therefore, not possible to move the site to a location 5.6 miles (or even 4.2 miles on the basis of the WDBO-TV present site) southward and away from WDBO-TV without encountering serious - and probably insurmountable - aeronautical objections.<sup>6/</sup> The WCIX-TV proposed location represents the best efforts of the FAA to accommodate a tower of sufficient height to permit the maximum utilization of the Channel.<sup>7/</sup>

5. MST's engineering statement to its objections reaches for something to support its stand. It tries to assume, for example, that line-of-sight transmission should be based upon an earth curvature of six-thirds of the earth's radius instead of the four-thirds factor employed in developing propagation curves, and it asserts that the radiation characteristic of the antennas to be employed by Coral and WDBO-TV is unsupported by "virtually no measurement of the transmitting antenna

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<sup>4/</sup> FAA issued ruling re WCIX-TV on May 5, 1966.

<sup>5/</sup> The description of this area is set out in a letter of FAA to broadcasters in the Miami area, which is attached hereto as Appendix A.

<sup>6/</sup> Any southern move from the FAA designated area would require an increase in tower height which could substantially aggravate the aeronautical problems. Furthermore, Homestead Airport lies 6.0 miles N 245° E and Homestead Air Force lies 5 miles N 130° E of the WCIX-TV proposed site (See Section V-G of BMPCT-6256).

<sup>7/</sup> Operating as proposed WCIX-TV will place city-grade service over virtually all of the City of Miami.

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pattern of these antennas in actual practical operation." In the attached statement of Silliman, Moffet & Kowalski (Exhibit B hereto), consulting radio engineers for Coral, it is pointed out that there is no foundation whatsoever for employing a six-thirds earth radius factor for propagation purposes and, furthermore, MST has not proposed any such change in connection with the particular question undergoing study in Docket No. 16004. As to the question of empirical support for the reliability of the proposed transmitting antenna pattern, MST ignores data submitted in Figure 2-D to BMPCT-6256 (Engineering Statement), particularly the specifications by the General Electric Company, supplier of the proposed antenna, which was based "on measured full scale data on a typical Channel 6 antenna as recorded at our Cazenovia Test Site. Significantly, MST does not suggest that the protection to be afforded by the respective proposed cannot be achieved.

6. Underlying the Commission's attitude against the allocation of Channel 6 in 1957 (Miami Drop-In Case, 15 RR 1638a) on a short-spaced basis was the fact that no showing had been made of the unavailability of a site south of Miami from where the requisite city-grade signal could be placed over Miami and still meet separation requirements.<sup>8/</sup> The record is now clear that no site is available which would not be aeronautically objectionable and would permit requisite city-grade service over the City of Miami. Significantly, the Commission indicated at the time Channel 6 was allocated to Miami that someday it might be presented

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<sup>8/</sup> The proposed facility would provide city-grade service to virtually all of the City of Miami - 99.89% of the land area (BMPCT-6256). Any move away from WDBO-TV would, of course, seriously affect this coverage.

with the question of whether in a specific case it should waive the separation rule upon a showing "that adequate coverage of Miami cannot be provided from antennas at sites which are both consistent with the rules and do not involve untoward hazards to air navigation. . ."

(15 RR 1638a, 1642d). WCIX-TV has made such a showing.

7. In effect MST is now requesting the Commission to reconsider its action taken in 1957 in assigning Channel 6 to Miami. All of the considerations leading to this action are still present. Although there has been a flurry of UHF activity, no UHF operations have materialized.<sup>2/</sup> Coral agrees with the concept of encouraging UHF television service, but this concept does not carry with it any suggestion that full and efficient use of VHF television service should be discouraged. Yet this is the principle the maximum service group now urges upon the Commission. Coral submits that its proposal is fully consonant with the Commission's objectives in assigning Channel 6 to Miami, which stated as follows:

"We believe, for the reasons set out in our prior decision, that public interest considerations clearly require that this valuable frequency not lie fallow when it can be used to provide additional service to the people in this large and fast-growing area. In light of the existing television situation in Miami - where three VHF stations are operating and the only UHF station now operating in the area has indicated that it could not compete in a three VHF station market - there is no doubt in our minds that the assignment of an additional VHF channel to Miami is necessary to provide greater opportunities for television growth and for comparable and effective competition among stations in the area so as to insure more and better television service to the public."

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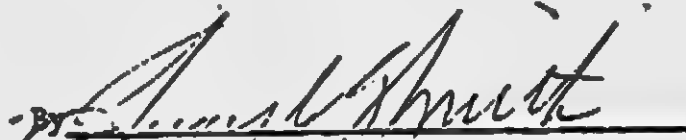
<sup>2/</sup> By letter of May 12, 1966 to the Commission, Storer Broadcasting Company notified the Commission that it has suspended its activities looking toward reactivation of WGBS-TV, Miami, Florida.

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8. Every feature of the WCIX-TV proposals before the Commission is in accord with over-all public interest consideration, i.e. the channel will be used fully and efficiently; aeronautical problems have been resolved; and a fourth competitive voice will truly be provided to the Miami community. On the other hand, MST has advanced no legitimate reason for Commission disapproval of these proposals. Accordingly, the Commission should dismiss the objections of MST for its failure to present any substantial and material question of fact.

Respectfully submitted,

CORAL TELEVISION CORPORATION



Thomas N. Dowd

Quayle B. Smith

Peter D. O'Connell

PIERSON, BALL & DOWD

1000 Ring Building

Washington, D.C. 20036

Its Attorneys

May 17, 1966

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APPENDIX A

FEDERAL AVIATION AGENCY  
Miami Area Office  
P.O. Box 2014, AMF Branch  
Miami, Florida 33159

February 18, 1966

In reply refer to  
MIA-500

Mr. Charles L. Kelly  
Vice-President & General Manager  
WCKT, Channel 7  
1401 79th Street Causeway  
Miami, Florida

Dear Mr. Kelly:

We are concerned about the continued conflict between the aviation community and broadcasting industries in the Miami area regarding the use of airspace. Historically, pilots have enjoyed a freedom of movement in airspace limited only by other aircraft and federal regulations designed to promote flight safety. In recent years, the broadcasting industry has found it necessary to use the airspace by constructing taller towers.

To satisfy both industry and aviation, we have found it necessary in some cases to select areas to accommodate tall structures. The limiting factor governing the location of such areas is the incompatibility of the height of associated structures with airspace needs of aviation. Obviously any tower tall enough to fulfill the needs of the television industry will invariably have some effect on aviation. The best solution is to localize these effects by selection of appropriate areas.

In July 1963 we initiated a study of airspace utilization in the Miami area. A second and more comprehensive study was conducted

in May 1965. Our evaluation of all the data obtained from these studies resulted in two possible site locations to accommodate tall towers in this area. One area is located northwest of Homestead Air Force Base and is described by a line beginning at latitude  $25^{\circ} 32' 15''$  N, longitude  $80^{\circ} 28' 30''$  W, extending to latitude  $25^{\circ} 33' 00''$  N, longitude  $80^{\circ} 28' 30''$  W; thence to latitude  $25^{\circ} 34' 00''$  N, longitude  $80^{\circ} 27' 25''$  W; thence latitude  $25^{\circ} 34' 10''$  N, longitude  $80^{\circ} 25' 30''$  W; thence latitude  $25^{\circ} 33' 35''$  N, longitude  $80^{\circ} 25' 30''$  W; thence latitude  $25^{\circ} 32' 15''$  N, longitude  $80^{\circ} 27' 30''$  W; then to point of beginning. The second area is located near the 40-mile bend on Tamiami Trail and is enclosed on the north by latitude  $25^{\circ} 53' 10''$ , on the west by longitude  $80^{\circ} 48' 45''$ , on the south by latitude  $25^{\circ} 47' 30''$ , and on the east by longitude  $80^{\circ} 46' 15''$ .

Our study is by no means complete. We still must coordinate with the aviation community to determine if certain aeronautical operations can be adjusted to accommodate these areas. We must also coordinate further with the U.S. Air Force. Community and state aviation officials will have to review the suggested areas before any decision can be made.

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At this point in our study we need to discuss this matter with you and representatives from the other Miami commercial television stations. Therefore, we suggest a joint meeting to be held at 10 a.m. in Room 202, FAA/Weather Bureau Building, at the Miami International Airport on March 1, 1966.

At this meeting we will have available certain displays showing the aeronautical information we have compiled in our most recent study. Since our study is incomplete, we obviously cannot commit ourselves to the use of these areas. We also could not expect you to commit your company. The primary purpose of discussing these matters is to obtain a declaration of interest on the part of the broad-



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casting industries in a concerted effort to resolve the conflict before us. Such a meeting should be beneficial to all parties and we urge your attendance. Please advise whether or not you or your representative will attend.

Sincerely yours,

John A. Graffius  
Chief, Air Traffic Branch

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**Storer**  
BROADCASTING  
COMPANY

*Suite 711 Madison Building*  
*1155 - 15th Street, N. W., Washington, D. C. 20005*  
*Telephone 296-7453*

WARREN C. ZWICKY  
VICE PRESIDENT  
AND WASHINGTON COUNSEL

May 23, 1966

RECEIVED  
MAY 23 1966  
OFFICE OF THE SECRETARY

Mr. Ben F. Waple  
Secretary  
Federal Communications Commission  
Washington, D. C. 20554

Re: BMPCT-6256, WCIX-TV, South Miami, Florida

Dear Mr. Waple:

There are transmitted herewith twenty copies of Storer Broadcasting Company's "Reply to Opposition" in the above-referenced matter.

Should any questions arise in connection with this matter, please communicate directly with the undersigned.

Very truly yours,

  
Warren C. Zwicky

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

MAY 23 1966

In re Application of

CORAL TELEVISION CORPORATION (WCIX-TV)  
South Miami, Florida

OFFICE OF THE SECRETARY

BMPCT-6256

For Modification of Construction  
Permit to Change Station Location,  
Transmitter Location, and Increase  
Height

Before the Commission

REPLY TO OPPOSITION

Storer Broadcasting Company ("Storer") respectfully replies to the  
"Opposition" of Coral Television Corporation ("Coral") to Storer's petition to deny  
the above-styled application.

Standing

1. Coral's assertion that Storer lacks standing ignores the factual showing  
made in the petition to deny. As there shown, the proposal would change the  
WCIX-TV station location from South Miami to Miami, double its authorized antenna  
height, and add 255,797 persons (53.5%) to the Principal City service area and  
127,705 to the Grade A service area. This change in location and substantial in-  
crease in coverage clearly confer standing upon Storer, the permittee of a Miami  
UHF station.

2. Storer readily concedes -- indeed, it already pointed out -- <sup>1/</sup> that  
Coral's tenure as Channel 6 permittee has been noticeable primarily for its

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<sup>1/</sup> Storer Petition, Par. 7.

successive modification applications, usually from one Ragged Key to another and usually with CP extension as a concomitant objective. But the instant application represents Coral's first try for the main chance; it is Coral's first open abandonment of Ragged Keys and South Miami in favor of a frontal attempt at Miami status. The instant application is the one which significantly increases the competitive effect on UHF in Miami, and thus the one which most directly confers standing on Storer. <sup>2/</sup>

#### Public Interest Factors

3. For the same reasons, Coral is incorrect in asserting that its instant application could not be a proximate cause in forestalling Miami UHF development. The effect of a grant would be to add another VHF station to Miami, and to permit it to extend and intensify its signal in the area's most populous regions. To suggest that this would not raise serious questions concerning the future of UHF in this VHF-saturated market is to ignore all history and experience.

4. In considering the impact of Coral's proposal and the separate question of technical waivers, it must be noted that Coral fails to address itself to the main thrust of Storer's petition -- that the basis for the 1958 Channel 6 drop-in has lost forcefulness in 1966. In 1958 the Commission envisioned VHF as the only opportunity for prompt establishment of a fourth competitive Miami station. But Coral

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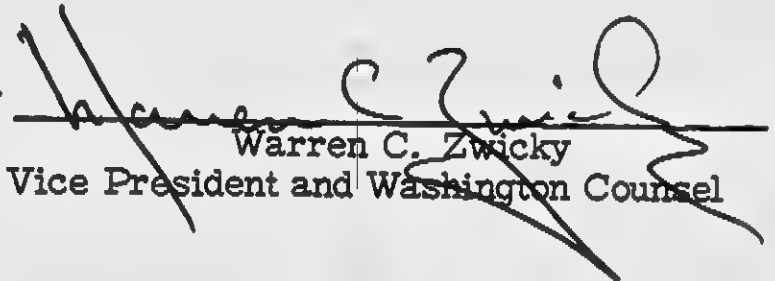
<sup>2/</sup> To suggest, as Coral does, that permission to locate its studio within the Miami limits constitutes permission to identify WCIX-TV as a "Miami" station is erroneous and misleading. WCIX-TV does not have permission to so identify itself, but seeks that permission in its instant application. Similarly, its contention that it already is authorized to serve "89% of the Miami land area" omits reference to the fact (apparent from the map attached to Storer's petition) that the City of Miami is only part of the densely populated area in which the instant application would extend and intensify the Channel 6 signal.

did not fulfill this opportunity. It cannot now rely on eight-year old reasons to justify waiver of important coverage and separations rules in 1966, when UHF might otherwise be available for additional Miami outlets.

Respectfully submitted,

STORER BROADCASTING COMPANY

By

  
Warren C. Zwicky  
Vice President and Washington Counsel

[235]

Before the  
Federal Communications Commission  
Washington, D. C.

RECEIVED

633  
MAY 24 1966

In re Application of )

F.C.C.  
OFFICE OF THE SECRETARYCoral Television Corporation )  
WCIX-TV, South Miami, Florida )

File No. BMPCT-6256

For Modification of Construction Permit )

Before the Commission: )

REPLY TO OPPOSITION TO PETITION TO DENY

L. B. Wilson, Incorporated (Wilson), by its attorneys, respectfully submits this reply to the opposition which Coral Television Corporation (Coral) has filed to its petition to deny this application. The following is submitted in support of this reply:

A. Standing

1. Coral contests Wilson's standing. To do so, it must take the position that the licensee of a station in Miami will not be aggrieved by a grant of an application which will, for the first time, assign Channel 6 to Miami. This proposition is so patently contrary to the law concerning standing before the Commission that argument is not necessary. Citation is sufficient. See, e.g. United Church of Christ v. Federal Communications Commission, \_\_\_\_ U. S. App. D. C. \_\_\_\_ (March 25, 1966); Federal Communications Commission v. Sanders Brothers Radio Station, 309 U.S.

470(1940); Elm City Broadcasting Corporation, 98 U.S. App. D. C. 314 (1956); Philco Corporation v. Federal Communications Commission, 103 U.S. App. D. C. 278. The law is clear. A competitor is a party in interest.

**B. Miscellaneous Issues**

2. The primary issue which Wilson raised in this case is the question of control. However, numerous other issues, each adequate to require a hearing, were discussed. These should be discussed briefly at the outset of this reply.

3. The question of impact upon UHF is critical in this case. Storer Broadcasting Company(Storer) is involved in development of a UHF station in Miami and thus would feel this impact with immediacy. The contents of the Storer Opposition and of its letter of May 12 to the Commission speak with stark and realistic eloquence. Reduced to its simplest terms, it is clear that this application must be denied if there is to be any UHF service in Miami. If the Coral application is granted, the residents of Miami will find the UHF channels on their new television sets a puzzling and interesting, though useless, curiosity.

4. Wilson observed in its Petition to Deny that the Coral application was fatally defective for lack of adequate financing. Coral states that it will file an amendment to cure this obvious problem (Opposition, para. 10).



Wilson, of course, reserves the right to examine this amendment with care, and comment upon its contents.

5. Coral persists in its view that program surveys for a station designed to serve South Miami are adequate for Miami. In none of its numerous applications has Coral proposed an assignment of Channel 6 to Miami. To move into a community for the first time, it seems incumbent upon an applicant to demonstrate the nature of the needs and interests of that community which it wishes to serve. Otherwise, there is no reason to deprive South Miami of its only local television outlet. Suburban Broadcasters, 20 RR 951.

6. In its Petition to Deny, Wilson quoted numerous statements which Coral made concerning the urgent need for service from Channel 6. Coral's performance in constructing was contrasted critically with these statements. Coral has submitted its explanation of its failure to perform in accordance with its promises. These explanations merely show that Coral's consistent objective has been to improve its authorized facilities, rather than construct (in accordance with representations) to meet the allegedly pressing need for broadcast service.

#### C. The Control Issue

7. Coral's opposition with respect to the question of control essentially admits all facts alleged in Wilson's petition to deny. Its principal defenses

concern a theory of family control and a claim that Wilson has not alleged any sworn facts in support of its analysis of the control situation. This latter defense is absolutely without merit. Every fact stated in Wilson's petition was drawn from Coral's own applications and ownership reports. All of these facts are not only admissions by Coral, but are subject to official notice by the Commission (See Section 1.580 (i) of the Rules). Not one of these facts was denied by Coral. The facts were properly alleged and must now be considered in detail.

8. Coral maintains that Wilson has made a "mistake" in its analysis of the Coral ownership reports. To establish this "mistake", Coral is driven to logical extremes which warrant some analysis:

a. Coral claims that Leo Robinson and Norman Swetman both continue to vote a total of 7% of the corporation's stock, which has been "placed in the hands of their respective children." It must be assumed that "placed in the hands of" is a special legal phrase meaning "given to", since the Coral ownership report filed on November 10 shows that the stock is held outright by these children. The report does, indeed, state that Messrs. Robinson and Swetman continue to "vote" this stock, but what does this mean? Does it mean that they have irrevocable right to vote the stock? Are they voting it pursuant to agreement which ensures that they will continue to have the right to do so? There is no information concerning the ages of these

children . There is nothing to indicate that these children lack the right to vote the stock. It is the right to vote which determines transfer of control. Coral has supplied no information concerning rights in this stock. Since Sections 1.613 and 1.615 of the Commission's rules require full reports of all rights and interests in stock of a permittee, and since the files contain no report of any such rights and interests, it must be concluded that the children have full rights in this stock.

b. Coral alleges that the stock of Edward H. Hill has been transferred in a "technical sense only", in that it passed to his son as executor of his estate upon his death. This statement challenges understanding. How a transfer of stock to an estate, pursuant to a will, can be considered merely "technical" is a proposition which Wilson cannot comprehend. Perhaps, if Coral would file a copy of the will, as required by the rules, the confusion could be resolved.

c. Coral notes that a cumulative total of 3.6% of its stock is held by the son of C. L. Clements and the members of the family of W. Keith Phillips, both original shareholders. This is irrelevant. It does nothing to contest the fact that this stock is held by neither Mr. Clements nor Mr. Phillips.

d. Coral concludes its analysis of de jure control with a massive non sequitur (Opposition, para. 16). "There has obviously been no de jure

transfer of control, and hence no need to file an application for Commission consent to such a transfer. The WHDH case (3 RR 2d 579), cited by Wilson in this regard is completely inapposite. In that case the facts showed that more than 50% of the stock held by original shareholders had passed from their hands'(emphasis supplied). The irony of this statement is clear. In the paragraph preceding this statement, Coral has admitted that more than 50% of the stock held by original shareholders had passed from their hands.

9. By Coral's clear admission, de jure control has passed out of the hands of the original shareholders. Since Coral has, very significantly, furnished the Commission with no contracts, agreements or instruments to demonstrate that the original shareholders still have voting rights 1/ in more than 50% of its stock, the conclusion that de jure control has been transferred is inescapable.

10. On the question of de facto control, Coral again criticizes Wilson for failure to allege facts under oath. Again, Wilson relies only upon

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1/ Coral's ownership report filed November 10, 1965, states that Messrs. Robinson and Swetman "vote" the stock held by their children. This would imply a pattern of voting. Mr. Clyne's affidavit (Ex. 2 to Opposition, para. 5) states that the stock of his family (acquired in October of 1965) has not in fact been voted. This raises a serious question as to when Messrs. Robinson and Swetman actually voted their children's stock.

facts supplied to the Commission by Coral. Wilson is not privy to the inner circles of Coral's management and ownership. Wilson can rely only on material available in the Commission's files and suggest logical inferences to be drawn from such material. It is respectfully submitted that these inferences compel a conclusion that actual control has been transferred to Mr. Clyne. If this dominant shareholder does not have control, it is at least clear that de facto control has been relinquished or at least placed in a legal "no man's land." WDUL Television, Inc., 22 RR 546k.

11. Coral takes the position that Mr. Clyne's control of 40% of its stock <sup>.2 /</sup> can not amount to control, as it is only a minority interest. The proposition is not that simple. The Commission has recognized that a minority stockholder may control a licensee (WWIZ, Inc., 2 RR 2d 169) and this is particularly likely when the remaining shareholdings are small and widely scattered (Elyria-Lorain Broadcasting Co., 6 RR 2d 191). On the

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2 / When Wilson inspected the Commission's ownership report files prior to filing its petition to deny, the Coral report (filed April 12, 1966) showing the acquisition by Hy Gardner (and family) of 5% of Coral's stock from Mr. Clyne was not in the file. Since Mr. Gardner is obviously Mr. Clyne's nominee for the Coral Board of Directors (he was elected the same day Mr. Clyne acquired his stock in Coral), Messrs. Gardner and Clyne are clearly in privity, and this 5% shareholding must be charged to Mr. Clyne for control purposes.

facts of this case it is certainly not possible to resolve the de facto control question without a hearing.

12. The full facts concerning control may be developed only in the hearing process. Coral has submitted numerous self-serving affidavits concerning the question of control. By the nature of this problem, Wilson can not produce sworn statements from the only people who can testify concerning the inner workings of Coral's stockholders. The problem requires full exploration of the testimony of witnesses under oath and subject to cross examination.

13. This question of control has become even more vexing as a result of material filed with the Commission by Coral in response to Wilson's petition to deny. On May 12, 1966, contemporaneous with the filing of its opposition, Coral filed with the Commission a specimen copy of pledge agreements executed by all shareholders, indicating for the first time that all of the corporation's stock is deposited with Mr. Clyne, subject to certain restrictions set forth in the "letters of consent." This additional index of control, added to those enumerated in Wilson's petition to deny, even more urgently requires a hearing on the control question.

14. Compounding these indications of control, Coral's opposition has raised yet another question. Exhibit No. 3 to Coral's opposition is the affidavit of William A. Berns. Mr. Berns is a newcomer to the shifting cast of characters involved in Coral's management, and submits under

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oath that he is "Executive Vice President and Managing Director" of Coral. He also states that he is "Executive Director", a role which he apparently shares with Mr. Clyne. Although he has allegedly held these vital corporate positions since January 1, 1966, it does not appear that this critical appointment has been reported to the Commission. <sup>3/</sup> Of utmost significance, it appears (id, para 3) that Mr. Berns was hired by Mr. Clyne, subject of course to "approval" by the Board.

Coral's application can not be granted without a hearing. The entire control picture, compounded by numerous failures to file vital information with the Commission requires careful exploration in the crucible of a hearing.

Respectfully submitted,

L. B. Wilson, Inc.

May 24, 1966

By Robert A. Marmet (Sec)  
Robert A. Marmet

Edwin R. Schneider, Jr.  
Edwin R. Schneider, Jr.

Its Attorneys  
Marmet & Schneider  
1822 Jefferson Place  
Washington, D. C. 20036

3/ A review of the ownership report file by undersigned counsel shows no report concerning Mr. Berns. Proof of a negative is always difficult, and it is, of course, possible that Coral reported this election to the Commission, but counsel can not find it.



JA 143

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D. C. 20554

RECEIVED

JUN 13 1966

In the Matter of  
the Applications of

THE OUTLET COMPANY  
WDBO-TV, Orlando, Florida

CORAL TELEVISION CORPORATION  
WCIX-TV, South Miami, Florida

For Construction Permits  
to Change Sites

F. C. C.  
OFFICE OF THE SECRETARY

File No. BPCT-3742

File No. BMPCT-6256

REPLY OF ASSOCIATION OF  
MAXIMUM SERVICE TELECASTERS, INC.

1. The Association of Maximum Service Telecasters, Inc. (MST), objected to the above-captioned applications of The Outlet Company, licensee of WDBO-TV, Channel 6, Orlando, Florida, and Coral Television Corporation, permittee of WCIX-TV, Channel 6, South Miami, Florida, because each proposes to move its transmitter from a site which meets the minimum co-channel mileage separation requirement to the other's existing site (and all other mileage separation requirements) to a new site which is short spaced to both the present and proposed site of the other.

2. MST pointed out that neither WDBO-TV nor WCIX-TV made the necessary affirmative threshold showing required by the Commission's Rules and decisions in order to avoid denial of its waiver request and dismissal of its application without further proceedings. Both WDBO-TV and WCIX-TV have filed brief "Comments" on MST's Objections. These fail to overcome MST's showing that both proposals should be summarily rejected. Few of the points and none of the rhetoric in the

"Comments" of WDBO-TV and WCIX-TV and related engineering material even merit a reply. Those that do are focused on below.

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## II. WCIX-TV'S COMMENTS.

12. Channel 6 was assigned to the Miami area on the assumption that adequate transmitter sites meeting mileage separation requirements would be available. Moreover, the Commission previously has declined to grant short separation requests involving Channel 6 because there has been no showing of the unavailability of such sites, as WCIX-TV properly notes.<sup>2/</sup> Notwithstanding WCIX-TV's unsupported assertions to the contrary,<sup>3/</sup> the fact is that WCIX-TV has also failed to show the unavailability of a transmitter site meeting mileage separation requirements.

13. WCIX-TV, of course, has, and for some time has had, construction permits for Channel 6 transmitter sites that meet mileage separation requirements. It claims that this should be put aside because such facilities do not allow it to provide the quality of service it wishes to provide to certain areas. But WCIX-TV has failed to prove either (a) that the public interest requires it to provide the service it seeks to provide, or (b) that it could not provide such service consistent with all of the Commission's Rules. It must make a prima facie case on both points even to be entitled to a hearing on its request for waiver.

1/ The point was also overlooked by WDBO-TV's consulting engineer. See underscored clauses on pages 1 and 10 of the WDBO-TV Engineering Statement.

2/ WCIX-TV Comments, page 4.

3/ Ibid.

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14. WCIX-TV claims the public interest requires it to have a short spacing so that it can increase its signal to Miami, to 89 per cent of which it could provide city grade service with already authorized facilities.<sup>1/</sup> But MST and others have shown that such an increase in signal at Miami at short spacings would adversely affect UHF development contrary to judicially approved Commission and Congressional policy.<sup>2/</sup> For example, Storer Broadcasting Company (Storer), permittee of Channel 23 at Miami, has informed the Commission that, in its judgment, continuation of construction of the Channel 23 station would be unwarranted if WCIX-TV's short-spaced application were granted.

15. It would be difficult to find a case of more direct and immediate adverse effect on UHF development. WCIX-TV evidently recognizes this for it merely argues in response to MST that "although there has been a flurry of UHF activity, no UHF operations [as yet] have materialized."<sup>3/</sup> The fact is that, until WCIX-TV sought its short spacing, Channel 23 was on the way to resuming operations. Moreover, even in cases of less advanced UHF development than here, the Commission has protected the potential for UHF development against the adverse effect of VHF short spacings. E.g., VHF Drop-Ins, 25 R.R. 1687 (1963).

16. Nor is there in the foregoing, contrary to WCIX-TV's assertion, any suggestion that the concept of

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1/ WCIX-TV Opposition to L. B. Wilson, Inc., Petition to Deny, page 2.

2/ The short spacing proposed by WCIX-TV cannot be deemed de minimis as WCIX-TV suggests. Comments, page 1.

3/ WCIX-TV Comments, page 5.

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encouraging UHF development carries with it the notion that VHF television service should be discouraged.<sup>1/</sup> The point is that, while full and efficient use of VHF channels in full compliance with all engineering standards is to be encouraged side-by-side with full and efficient use of UHF channels on the same basis, use of VHF channels in violation of the engineering standards is not to be sanctioned, particularly where, as here, there would be adverse impact on UHF.

17. WCIX-TV has also failed to show that it could not increase its presently authorized signal to Miami consistent with the mileage separation requirements. WCIX-TV's only effort at a showing on this point is an unsupported assertion that the aeronautical situation requires a short spacing. Neither WCIX-TV's Comments in Response to MST's Objections nor its Opposition to a Petition to Deny filed by L. B. Wilson, Inc., even addresses itself to the question of possible height increases at WCIX-TV's present site. As to other sites in the substantial area generally south of WCIX-TV's proposed site which MST has shown meets mileage

requirements, WCIX-TV merely asserts, without supporting data, that aeronautical objections would be encountered.<sup>2/</sup> This falls far short of a showing that a tall tower could not be utilized at any site in this area.

18. WCIX-TV asserts that its short-spaced proposal represents "the best efforts of the FAA to accommodate

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<sup>1/</sup> WCIX-TV Comments, page 5.

<sup>2/</sup> WCIX-TV does not even allege that these objections would be insurmountable (Comments, page 3), and it is well known that even serious aeronautical objections have been resolved in past cases.

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a tower of sufficient height to permit the maximum utilization of the channel."<sup>1/</sup> However, this assertion is not supported by any factual material. The fact that the proposed short-spaced site is within one area described in a letter from the FAA's Miami Office as possibly being available for tall towers does not even indicate that FAA considered or was asked to consider the alternative area referred to by MST, let alone indicate that there are no other sites that FAA would find acceptable that meet the Commission's engineering requirements.

### III. THE AGREEMENT BETWEEN WCIX-TV AND WDBO-TV DOES NOT RESOLVE THE PUBLIC INTEREST QUESTIONS PRESENTED.

19. In its Objections, filed Monday, May 2, 1966, MST stated that neither WDBO-TV nor WCIX-TV had made any attempt to justify its own waiver request in light of the proposed short-spaced application of the other. On the

previous Friday, April 29, 1966, WCIX-TV and WDBO-TV did file material with the Commission addressed to this point.<sup>2/</sup> In this material, each agreed to the short separation of the other.

20. Disposition of the public interest questions posed by the two short-spaced applications cannot be on the basis of the agreement between the stations to accept the mutual shortage. The Commission must decide whether or not

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1/ WCIX-TV Comments, page 3.

2/ Although MST had advised both applicants on April 14, 1966, that it was preparing objections to both applications, MST was not provided a copy of the April 29, 1966, filing and did not learn of its existence until after its Objections were filed on May 2.

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the applications and requests for waiver are to be granted, and grant may be made only if the Commission decides such action would be in the public interest. Thus, in WTCN Television, Inc., FCC 65-103 (February 15, 1965), modified on rehearing, 5 R.R.2d 572 (1965), KMSP-TV, Minneapolis, Minnesota, sought waiver of the mileage separation rules with respect to co-channel station WAOW-TV, Wausau, Wisconsin. Despite the fact that WAOW-TV consented to the proposed short separation, the Commission refused to grant KMSP-TV's application, but instead set it down for hearing.

21. Moreover, the material submitted with the April 29, 1966, agreement does not include adequate technical conditions to assure that the proposed antennas will in fact perform as proposed. This material and previous engineering

showings made herein by WCIX-TV and WDBO-TV reveal that each proposes to use a non-directional antenna, and to depend solely upon the non-circularity of the antenna each proposes to suppress radiation in the direction of the other. WDBO-TV also states that the manufacturer provides a pattern measured on the test range for the antenna. However, as pointed out in the MST Engineering Statement attached hereto, even if the accuracy of the pattern measured on the test range is conceded, such measurements would not necessarily be representative of the actual operational pattern that would be produced by the actual installation. Moreover, neither applicant proposes to test its antenna pattern after installation, either by the reference antenna, the rotational, or any other method of measurement or test.



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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

**ORIGINAL**

JUL 6 1966

In re Application of  
CORAL TELEVISION CORPORATION  
WCIX-TV, South Miami, Florida  
For Modification of Construction  
Permit

F.C.C.  
OFFICE OF THE SECRETARY  
File No. BMPCT-6256

Before the Commission

PETITION FOR WAIVER, IMMEDIATE CONSIDERATION AND  
GRANT OF APPLICATION

Coral Television Corporation (hereinafter sometimes referred to as Coral), by its attorneys, hereby respectfully and urgently requests that the Commission waive Sec. 1.572(c) of its Rules so as to permit the immediate processing and expeditious grant of Coral's above-captioned application for modification of construction permit. In support of this request, the following is shown:

1. Coral's application for modification of its construction permit for Station WCIX-TV, Channel 6, was filed on March 15, 1966, and amended on June 15, 1966 (BMPCT-6256). The application seeks authority to change the antenna location from Ragged Key #3, Islandia, Florida, with a 549 ft. tower, 12.2 miles south of Miami, to Homestead, Florida, west of the Ragged Key location, 18.1 miles south of Miami. Inasmuch as the proposed 1049 ft. tower at the Homestead location would enable WCIX to cover practically all of Miami with the city-grade signal, the application also requests authority to change the station location from South Miami to Miami.

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If Coral is authorized to construct Station WCIX-TV pursuant to the proposals set forth in the amendment, the station will place a city-grade signal over 99.89% of Miami - in contrast to the city-grade coverage over approximately 89% of Miami land area which is afforded by the permittee's existing authorization (BMPCT-6256, Engineering Report, p. 2, and BMPCT-6242, Engineering Statement). Thus, the quality of the station's service would be improved for thousands of persons in the Greater Miami area. Channel 6 is assigned to Miami, Florida (Sec. 73.606 of the Rules) and Coral's request to move its station and antenna to that city is in full accordance with the Commission's allocation table. 1/ The amended proposal involves a slight variance from the mileage separation rules in respect to Station WDBO-TV, Orlando, Florida. Coral and Station WDBO-TV have requested a waiver of Sec. 73.610 of the Rules to accommodate this variance.

2. Coral's proposed site lies just inside the southern limit of an area specified by the FAA where a tall tower could be located. This FAA proposal was developed after long studies by the FAA and represented its best efforts to accommodate its best interest. Coral applied to the FAA for a determination that the proposed new WCIX-TV antenna structure would not constitute a hazard to air navigation. Such a determination was issued by the FAA on May 5, 1966, and this ruling became final by further

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1/ On March 24, 1966, the Commission issued a modification of Coral's construction permit authorizing the permittee to change the location of the WCIX-TV main studio to downtown Miami (BMPCT-6242).

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notice of the FAA dated June 30, 1966 (Aeronautical Study No. MIA-OE-66-19 (Amended)). A copy of the FAA's further notice is attached hereto as Exhibit A. Coral has therefore received full clearance for its proposed antenna tower insofar as aeronautical considerations are involved.

3. The Commission has received petitions to deny the pending Coral application filed by the licensees of Station WLBW-TV, Channel 10, Miami, and Station WPTV, Channel 5, West Palm Beach, Florida; and the permittee of Station WGBS-TV, Channel 23, Miami. Also, objections were filed by the Association of Maximum Service Telecasters, Inc. Pleadings in opposition to these petitions and replies thereto were duly filed. An examination of the pleadings and the documents which have been filed pursuant to the ownership requirements of the Commission fully answered any factual questions that may have been raised with respect to the voting rights. Insofar as injury to existing and non-constructed stations are concerned, the Commission's decision on the Petition for Reconsideration in the Atlantic Telecasting Corporation 2/ case is completely in point and clearly establishes that the petitioners are without standing. The petitions can and should now be denied by the Commission without further delay. Each petition asserts a desire to protect a private interest; none involves a question of the public interest. WLBW-TV's spurious arguments with respect to Coral's financial qualifications have also been shown to be without merit.

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2/ In re Atlantic Telecasting Corporation (WECT), File No. BPCT-3447; Memorandum Opinion & Order, FCC 66-307, April 13, 1966.

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4. The Commission is familiar with the unique difficulties that have been visited upon Coral's efforts to construct Station WCIX-TV at a site which would be compatible with the Commission's Rules and which would assure the maximum effective service to the greater Miami community. 3/ Because of antenna tower height limitations applicable to the area immediately south of Miami and imposed by then-prevailing FAA policies, Coral's original application for Channel 6 specified a South Miami station with an antenna site on an island in the off-shore Ragged Keys in Biscayne Bay. This original site was later found to be unsuitable for increases in antenna height (due to the small land area of the island). Successive moves to other Ragged Key islands were initially frustrated by local government rulings and, when the FAA made known for the first time in late 1965 and early 1966 that suitable arrangements could be made for tall towers in the area of Homestead, Florida, serious consideration had to be given to use of this new area from the standpoint of improved service to the area, efficiency of operation and utilization of the frequency. As shown on the company's balance sheet as of April 30, 1966 (set forth in the instant application), \$64,477.13 has been invested in fixed assets, \$109,000 downpayment has been made on over seven hundred thousand dollars in technical equipment (including \$176,000 for the 1,000 ft. tower now under construction), and over \$443,000 has been paid toward the pre-operational expenses of WCIX-TV. It is surely not necessary to emphasize that these

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3/ Attached hereto as Exhibit B is a copy of an affidavit of Robert L. Johns setting forth in detail the chronology of Coral's efforts to find and obtain approval for an acceptable antenna and transmitter site. This affidavit was attached to Coral's Opposition to Petition to Deny dated May 12, 1966, and directed to the Petition of L. B. Wilson, Inc.

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expenses are steadily mounting on a daily basis while the Commission considers the pending modification of construction permit, and that this growing stand-by expense is a matter of the most serious concern to the permittee and to the Miami public which is awaiting service on Channel 6.

5. There are additional circumstances which create the present urgency in securing immediate processing and a prompt grant of the Coral application. Coral's schedule for construction of WCIX-TV must of necessity include full consideration for hurricane dangers in the Miami area. As indicated by the attached letter which the permittee received from the Director of the Meteorological Center of the Miami Weather Bureau (Exhibit C hereto), the most serious hurricane threat in this area will occur from late August through October. To avoid delaying the commencement of construction until late October or November 1966, certain construction steps will have to be accomplished prior to the first of September. Thus, the affidavit of James O. Denham, attached hereto as Exhibit D, reflects that in order to protect equipment and minimize possible hurricane damage, it is important to construct and close the WCIX-TV transmitter building prior to September 1, 1966. This affidavit further indicates that to accomplish this task the transmitter construction should be commenced several weeks in advance of September 1. Moreover, the schedule of tower construction will be seriously affected by the hurricane season, and for this reason Coral should, if possible, assure that tower footings can

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be completed prior to the end of August. The process of construction itself will, of course, consume additional time, including approximately two months to fabricate the proposed antenna tower and an additional month to erect it. During all of these additional delays, Coral will obviously be bearing continued pre-operational and stand-by expenses.

6. Further support for the immediate processing and expeditious grant of Coral's application for modification of permit is provided by the plain need for the early utilization of a fourth VHF television channel in Miami. This need for service has existed for several years and grows greater each day. More than eight years ago, the Commission concluded that public interest considerations "clearly require that this valuable frequency not be fallow when it can be used to provide additional service to the people in this large and fast-growing area" (Miami Drop-In Proceeding, 15 RR 1642a, 1642c (1958)). 4/ Despite numerous and difficult problems encountered in reconciling the need to provide fully effective television service in Miami with FAA height limitations and Commission mileage separation rules, Coral has now, through the expenditure of substantial amounts of time and money, succeeded in resolving these obstacles. It awaits only the issuance of Commission authority to begin construction of Station WCIX-TV at the proposed new site, which construction will require approximately five months to complete.

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4/ The population figures available to the Commission in 1958 reflected a population in Miami of 249,276 persons and a population in Dade County of 458,647 persons (1950 census). By 1960, Miami's population had increased by 17% to 291,688 persons, and Dade County's population had grown by 86% to 852,705 persons (1960 census).

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7. Coral recognizes and appreciates the work load confronting the Commission and its staff. However, Coral sincerely believes that the importance of the problems herein presented and their impact on the public convenience, interest and necessity fully warrants priority consideration. It is respectfully submitted that, in the light of all of the circumstances recited above, the Commission should immediately process and expeditiously grant the Coral application for modification of construction permit, denying or dismissing the petitions to deny and objections heretofore filed in connection with the application.

Respectfully submitted,

CORAL TELEVISION CORPORATION

By   
Thomas N. Dowd  
PIERSON, BALL & DOWD  
1000 Ring Building  
Washington, D. C. 20036  
Its Attorneys

July 6, 1966



JA 157

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EXHIBIT A



FEDERAL AVIATION AGENCY  
Washington 25, D.C. 20553

JUN 30 1966

IN REPLY  
REFER TO: AT-200

Mr. Robert B. Hankins  
1000 Ring Building  
Washington, D.C. 20006

Re: Petition for Review of Determination  
of No Hazard (Aeronautical Study  
No. MIA-OE-66-19, Amended)

Dear Mr. Hankins:

The petition of Scripps-Howard Broadcasting Company for a  
discretionary review of the Determination of No Hazard in  
Aeronautical Study No. MIA-OE-66-19, Amended, was denied.

Accordingly, the Determination is final as of June 14, 1966.

Sincerely yours,

A handwritten signature in cursive script that reads "Archie W. League".

Archie W. League, Director  
Air Traffic Service

cc: Federal Communications Commission  
Washington, D.C. 20554

JA 158

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 67-188  
94685

In re Application of:

CORAL TELEVISION CORPORATION (WCIX-TV)  
South Miami, Florida

For Modification of Construction Permit  
to Make Changes

File No.  
BMPCT-6256

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Bartley, Lee and Johnson  
dissenting; Commissioner Cox concurring  
in the result.

1. The Commission has before it for consideration the above-captioned application of Coral Television Corporation, permittee of Television Broadcast Station WCIX-TV, Channel 6, South Miami, Florida; two petitions to deny and informal objections filed in connection therewith<sup>1</sup> and various related pleadings.<sup>2</sup>

2. The applicant is authorized to operate as a South Miami, Florida, station from a site on Ragged Key No. 3, in Biscayne Bay, with effective radiated visual power of 100 kw and antenna height above average terrain of 500 feet. Its authorized site conforms to all spacing requirements of the Commission's rules. The applicant requests authority to change its principal community to Miami, to change the site of its transmitter to a point near Homestead, Florida (3.7 miles west of Princeton, Florida, 17.1 miles west of its pres-

ent site and on the Florida mainland), reduce effective radiated visual power to 87.3 kw, increase

<sup>1</sup> Petitions to Deny were filed against the application by Scripps-Howard Broadcasting Company, licensee of Television Broadcast Station WPTV, Channel 5, West Palm Beach, Florida (April 29, 1966); Storer Broadcasting Company, permittee of Television Broadcast Station WGBS-TV, Channel 23, Miami, Florida (April 29, 1966); and L. B. Wilson, Incorporated, licensee of Television Broadcast Station WLBW-TV, Channel 10, Miami, Florida, (April 29, 1966). Informal objections were filed May 2, 1966, by The Association of Maximum Service Telecasters, Inc. (AMST), pursuant to Section 1.587 of the Commission's Rules. On October 18, 1966, Scripps-Howard withdrew its Petition to Deny.

<sup>2</sup> The numerous pleadings filed in this proceeding are listed in the Appendix attached hereto. On June 3, 1966, Sunbeam Television Corporation, licensee of Television Broadcast Station WCKT, Channel 7, Miami, Florida, filed a pleading entitled "Response to Petition to Deny Filed by Scripps-Howard Broadcasting Company" in which it undertook to respond to the Scripps-Howard petition. The withdrawal of the Scripps-Howard petition renders this pleading moot.

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antenna height above average terrain to 994 feet, and make other changes in the facilities of the station. The station, as now authorized, has not been constructed and a further extension of time within which to construct was granted on November 1, 1966 (BMPCT-6338).

3. On March 1, 1966, The Outlet Company, licensee of Television Broadcast Station WDBO-TV, Channel 6, Orlando, Florida, filed an application (BPCT-3742), requesting a construction permit to make certain changes in the facilities of that station, including a change of transmitter site to a point approximately 3.5 miles north of Bithlo, Florida. The transmitter site proposed by Coral Television in the application which we here have under consideration would be 215.6 miles from the present site of Station WDBO-TV<sup>3</sup> and would, therefore, involve a short-spacing of approximately

[R. 460 cont'd]

4.7 miles. The distance between the two proposed sites would be 214.3 miles, a shortage of approximately 6.1 miles. Thus, the site proposed by Station WCIX-TV would involve a short-spaced operation to both the present and proposed sites of Station WDBO-TV. Both applicants have indicated their willingness to afford "equivalent protection" to one another and to accept one another's "equivalent protection", and both have requested waivers of Section 73.610(b)(1) of the Commission's Rules.<sup>4</sup>

4. Operating as proposed, Station WCIX-TV would place a principal city signal (74 dbu) over 99.89% of the land area of the City of Miami.<sup>5</sup> The operation would, therefore, be inconsistent with our rules on this respect and the applicant has also requested a waiver of Section 73.685(a) of the Rules.

5. Petitioners herein allege standing as "parties in interest" within the meaning of Section 309(d) of the Communications Act of 1934, as amended, on the grounds that a grant of the application would increase the signal strength provided by Station WCIX-TV in areas commonly served by the Miami stations, would increase the area within which the Miami stations compete with WCIX-TV for viewership and advertising revenues, and would make Station WCIX-TV a Miami station instead of a South Miami station. These factors, it is alleged, would inflict economic injury on the petitioners. AMST claims only the status of an informal objector

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<sup>3</sup>Section 73.610(b)(1) of the Commission's Rules provides that the minimum mileage separation between co-channel VHF stations operating in Zone III is 220 miles.

<sup>4</sup>See Footnote 3, *Supra*.

<sup>5</sup>Section 73.685(a) of the Commission's Rules requires that VHF stations operating on Channels 2-6 place a minimum signal of 74 dbu over the entire principal community to be served.

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pursuant to Section 1.587 of the Commission's Rules. The standing of the petitioners is disputed by the applicant on the basis the petitioners should have objected to applicant's proposals to move to its present site and/or its proposal to locate its main studios in the City of Miami.<sup>6</sup> We cannot agree. The exercise of a statutory right in connection with a prior proceeding is not a condition precedent to the exercise of a statutory right in a subsequent proceeding, *Zenith Radio Corporation v. Federal Communications Commission*, 83 U.S. App. D.C. 284, 211 F.2d 629, 10 RR 2001. Petitioners have made sufficient allegations of economic injury to show that they are "parties in interest". We find that the petitioners have standing. *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470, 60 S.Ct. 9 RR 2008. The petitioners and AMST have raised numerous questions in connection with Coral's proposal, and we shall consider them *seriatim*.

#### 6. *Short-spacing*

Channel 6 was allocated to Miami (FCC 57-412, 15 RR 1638a) for the purpose of providing Miami with a fourth competitive VHF television broadcast service. The Commission contemplated that the site of such a station would have to be in the vicinity of Homestead, Florida, approximately where Coral now proposes to relocate its site. The Commission granted Coral authority, on March 24, 1966, to locate its main studios within the city limits of Miami (BMPCT-6242). Coral's present facilities would enable it to provide a principal city signal to nearly 90% of the City of Miami. Realistically, the station is, except nominally, already a Miami station, as it was intended to be. No person who would be within the presently authorized Grade B contour of the station will be deprived of that service, but a stronger signal will be provided to more than 127,000 persons within the proposed Grade A contour and 256,000 persons within the proposed

principal city contour. In the Memorandum Opinion and Order (FCC 58-148, 15 RR 1642a) in the Miami Drop-In Case (see also *Report and Order* in Docket No. 11532, 13 RR 1571 and *Miami Drop-In Case*, FCC 57-412, 15 RR 1638a), we indicated that, in an appropriate adjudicatory proceeding, we might consider waiving the spacing rules if it is determined that adequate coverage of Miami could not be provided from sites south of Miami which are both consistent with the rules and do not involve untoward hazards to air navigation. Coral has shown that it could not locate such a site, since a site southward would encounter serious aeronautical objections. Coral states that its proposed location represents the best efforts of the Federal Aviation Agency to accommodate a tower of sufficient height to permit maximum utilization

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<sup>6</sup>The applicant requested, and was granted on March 24, 1966, authority to locate its main studios outside the corporate limits of its principal community, specifically in the City of Miami, pursuant to Section 73.613(b) of the Commission's Rules.

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of the channel. To support its contentions that no site is available to it which would meet aeronautical safety criteria and still provide sufficient coverage of Miami, Coral has submitted a copy of a letter from the Federal Aviation Agency dated February 18, 1966, to Miami area broadcasters in which that agency delineated two areas within which it indicated that broadcast towers could be accommodated without intolerable interference to aeronautical interests. Coral states that its proposed site, which has FAA approval, is in the southwest corner of the area northwest of Homestead Air Force Base. A southward move would result in a location outside the approved area and, presumably, conflict with aeronautical safety interests.

7. The Commission has, for many years, been keenly conscious of the problems involved in locating appropriate sites for broadcast towers in the Miami area. We think that the proposal before us represents the best opportunity to provide Miami with a fourth competitive VHF television service with a reasonable assurance of economic viability and deference to air safety considerations. On balance, it seems clear that those detriments flowing from operation in derogation of our rules to the extent here involved are far outweighed by the public interest considerations inherent in the early inauguration of another VHF television service to Miami and greater service to more persons with no loss to any.

#### 8. *UHF Impact*

Petitioners allege that a grant of the application would have an adverse impact on the development of UHF television broadcasting in the area and would impair the ability of authorized UHF television stations in Miami to compete successfully. Petitioners, however, have not alleged sufficient facts in support of this contention to require designation of the application for hearing. Under Coral's present authorization, its principal city contour includes nearly all of Miami and its predicted Grade A contour covers the remainder; its authorized Grade B contour extends substantially farther north into the densely populated coastal region. The proposed Grade B contour, however, would include less than an additional 21,000 persons (an increase of 1.6% in the population presently within the authorized Grade B contour). Thus, there would be a relatively insignificant increase in the number of persons within the Grade B contour. Moreover, Miami is within the principal city contours of the following Miami television broadcast stations: WTVJ (CBS), Channel 4; WCKT (NBC), Channel 7; WLBW-TV (ABC), Channel 10; WGBS-TV Channel 23 (not in operation); and WTMJ, Channel 39 (not yet built). In addition, Miami is within the predicted Grade B contours of West Palm Beach, Florida, television stations WPTV (NBC), Channel 5, and



WEAT-TV (ABC), Channel 12. In these circumstances, we are asked to conclude that the improvement in signal strength which Coral proposes would make the difference in whether UHF television broadcasting could succeed in Miami.

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9. Coral's proposed Grade B gain area lies over largely uninhabited swamp area and the waters of the Gulf of Mexico to the west. There is, however, a part of the gain area to the north along the coastal region, which includes the community of Delray Beach, Florida. This is where the bulk of the 21,000 persons who would receive WCIX-TV's signal for the first time reside. This area is also within the predicted Grade B contour of Station WGBS-TV and is the only area where the two stations would be in competition for the first time. Otherwise, the only effect of Coral's proposal would be a general improvement of signal strength throughout its authorized Grade B area. Thus, it is apparent that the only factors which could affect UHF television broadcasting in Miami would be the improvement of signal strength throughout Coral's presently authorized Grade B service area and the addition of 21,000 persons in that portion of the gain area which lies to the north. Storer has not shown that, of well over 1,000,000 persons in the Greater Miami area, coverage by Coral of an additional 21,000 for the first time would be of any significance. Storer has not addressed itself specifically to the question of how the proposed improvement of signal strength would adversely affect UHF development and success in Miami, whereas operation by Coral as presently authorized would not. Storer's failure to make specific allegations of fact on this point is, we think, fatal to its contentions of adverse impact on UHF broadcasting. See *Atlantic Telecasting Corporation (WEAT)*, FCC 66-307, 3 FCC 2d 442, 7 RR 2d 297, affirmed *sub nom Jackson F. Lee et al. v. Federal Communications Commission*, \_\_\_ F 2d \_\_\_, C.A.D.C., Case

No. 20187, decided January 19, 1967. Moreover, where, as here, UHF and VHF stations are authorized to the same community, the existence of the former does not, *per se*, operate to preclude improvement of the facilities of the latter. Requests for changes by VHF stations from time to time are to be expected, and UHF stations in the same community must be aware of this. In opposing such changes, the UHF stations are bound to allege specific facts to show that such changes would not be in the public interest.<sup>7</sup> This Storer has failed to do.

10. *Suburban*

L. B. Wilson alleges that Coral has not demonstrated that it has made assiduous efforts to ascertain the programming tastes, needs and interest of the new area to be served, raising a *Suburban* question.<sup>8</sup> We find no merit in this contention. Coral satisfied the Commission, when it won its construction permit after a comparative proceeding, that it had met the requirements of *Suburban*. In its earlier application (BMPCT-6178) for modification of its construction permit which was granted on December 14, 1965, Coral submitted a 35-page survey report setting

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<sup>7</sup>Cf. *WLCY-TV, Inc. (WLCY-TV)*, FCC 66-1152, 6 FCC 2d 213.

<sup>8</sup>*Patrick Henry et al. v. Federal Communications Commission*, 112 U.S. App. D.C. 257, 302 F.2d 191, 23 RR 2016.

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forth its efforts to ascertain the programming tastes, needs and interests of the Greater Miami area. It has always maintained that it was a Miami station and states that it has, for this reason, formulated its programming proposal to be responsive to the needs of the entire Miami area. This is a rational and reasonable approach, and in view of the submission of the extensive survey report, we are satisfied that Coral has met the requirements of *Suburban*.

### 11. *Financial Qualifications*

Based on information contained in the Coral application, approximately \$1,530,000 will be required to construct and operate the station for one year, consisting of down payment on equipment (\$130,000), costs of operation (\$850,000), payments to General Electric Credit Corporation (\$144,000), interest on loans totalling \$700,000 (\$42,000), loan amortization on \$400,000 loan (\$50,000), loan curtailments (\$162,000), and miscellaneous costs (\$152,000). The foregoing amounts, except for down payment on equipment, constitute the applicant's estimated costs of operation in the first year (\$1,400,000). To meet these costs, the applicant has available to it cash of \$616,309 and advance payments to GECC of \$104,000, totalling \$720,309. For the remaining \$810,000, the applicant relies upon revenues. To support its ability to obtain this much in revenues,<sup>9</sup> the applicant has submitted an evidentiary showing, as required by our decision in *Ultravision Broadcasting Company*, FCC 65-581, 5 RR2d 343, based on an analysis of the market, expert opinion, and other data, including data on comparable markets. On the basis of the comprehensive studies submitted by Coral, we are persuaded that it is reasonable to expect Coral to be able to realize at least 6% of the total broadcast revenues of the Miami market which is estimated to have been at least \$14,000,000 in 1966. The applicant has also reserved for itself a substantial "cushion" for unanticipated expenses and contingencies (\$152,000). We believe that, under these circumstances, Coral has convincingly demonstrated its financial ability to construct and operate the station for one year.

### 12. *Unauthorized Transfer of Control*

L. B. Wilson alleges that there has been a transfer of control of Coral without the approval of the Commission. The ownership report filed by Coral on June 1, 1964, as of May 26, 1964, showed that 100 of the 500 authorized shares of stock were issued to ten

stockholders in varying amounts. Except for two stockholders, each stockholder held 11% of the stock. On November 10, 1965, Coral filed an ownership report as of October 14, 1965, showing that all 500 shares of authorized stock had been issued; of the issued stock, 235 shares (47%) were owned by nine of the original ten stockholders<sup>10</sup> and the remaining 265 shares (53%)

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<sup>9</sup> Applicant estimates first year revenues will be \$1,500,000.

<sup>10</sup> Edwin H. Hill, Sr., an original 11% stockholder, had died and his stock passed to his son, Edwin H. Hill, Jr., as Executor.

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were held by nine new stockholders. One of the new nine was the executor of the Estate of Edwin H. Hill, Sr., (6%); three were the wife and children of Norman Swetman (aggregating 3%; together with Swetman, 6%); one was the son of Leo Robinson (4%; together with his father, 9%). Hill, Sr., Swetman, and Robinson were all original stockholders. At the same time, C. Terence Clyne acquired 200 shares of stock (40%) pursuant to a Stock Purchase Agreement filed by Coral. Clyne distributed his stock equally among himself, his wife, and his two children, so that each owned 50 shares (10%). Clyne became the largest single stockholder. At this point, the original stockholders held legal title to 47% of the stock, but Leo Robinson and Norman Swetman continued to vote the stock of their family members. Under this arrangement, the original stockholders continued to vote 54% of the stock. Clyne voted the full 40% of his family's stock.

13. Coral's ownership report, filed December 21, 1965, as of November 18, 1965, disclosed further changes. These changes, for the most part, consisted of stock distributions by C. L. Clements, Sr., and W. Keith Phillips, Sr. (two of the original stockholders) to mem-

bers of their families. At that point, the original stockholders held legal title to 43.4% of the stock (217 shares), but voted 50.4% (252 shares). Coral's most recent ownership report, filed April 11, 1966, showed current holdings as follows:

<u>Stockholder</u>	<u>Shares Owned</u>	<u>%</u>	<u>Shares Voted</u>	<u>%</u>
*Leon C. McAskill	30	6	30	6
*Robert L. Johns	30	6	30	6
*Leo Robinson	25	5	45	9
*Robert A. Peterson	20	6	30	6
*Cameron Stewart	30	6	30	6
*Arthur Adler	30	6	30	6
*W. Keith Phillips, Sr.	14	2.8	14	2.8
*Norman Swetman	15	3	30	6
*C. L. Clements, Sr.	13	2.6	13	2.6
	<u>217</u>	<u>43.4%</u>	<u>252</u>	<u>50.4%</u>

\*Original stockholders

C. Terence Clyne	25	5	175	35
Steve D. Robinson <sup>11</sup>	20	4	—	—
Edwin H. Hill, Jr. Executor	30	6	30	6
Ludie A. Swetman <sup>12</sup>	5	1	—	—
Sandra M. Swetman <sup>13</sup>	5	1	—	—
Robin N. Swetman <sup>13</sup>	5	1	—	—

<sup>11</sup> Son of Leo Robinson

<sup>12</sup> Wife of Norman Swetman

<sup>13</sup> Children of Norman Swetman

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<u>Stockholder</u>	<u>Shares Owned</u>	<u>%</u>	<u>Shares Voted</u>	<u>%</u>
Frances D. Clyne <sup>14</sup>	50	10	—	—
Terence D. Clyne <sup>15</sup>	50	10	—	—
Michael John Clyne <sup>15</sup>	50	10	—	—
C. L. Clements, Jr. <sup>16</sup>	2	0.4	2	0.4
W. Keith Phillips, Jr. et ux <sup>17</sup>	7	1.4	7	1.4
Marion K. Phillips <sup>17</sup>	3	0.6	3	0.6
Betty Phillips Jamieson <sup>17</sup>	3	0.6	3	0.6
Douglas M. Phillips et ux <sup>17</sup>	3	0.6	3	0.6
Hy Gardner et al.	25	5	25	5
	283	56.6%	248	49.6%

14. We consider first whether there has been a transfer of *de facto* control to C. Terence Clyne. On October 14, 1965, a Stock Purchase Agreement was executed which, *inter alia*: (1) gave Clyne 200 shares of stock (40%), making him the largest single stockholder, the next highest being 6%; (2) made Clyne Executive Director; (3) gave Clyne the right to select three of the seven members of the Board of Directors; and (4) provided that the station could not be sold without an affirmative vote of 65% of the stock. Clyne was the only stockholder owning more than 35% of the stock and he alone could, therefore, have "blocked" sale of the station. One month later (November 18, 1965), Clyne was also made Chairman of the Board. On March 30, 1966, Clyne transferred 25 shares (5%) of his stock to Hy Gardner, and Gardner's wife and child, as tenants-in-common. On October 14, 1965, the date of the Stock Purchase Agreement and Clyne's acquisition of 40% of the stock, Clyne, Gardner, and Harold Strauss (a non-stockholder) were elected to the Board of Directors. These three constituted Clyne's appointees. Under the terms of the Stock Purchase Agreement, Clyne was required to obtain for the corporation a bank loan of

\$600,000 as a condition precedent — a condition which he has met. The Agreement also provided for resignation of all existing directors and the election of McAskill, Robinson, Peterson, Stewart, Clyne, Gardner, and Strauss as Directors and the selection of Clyne as Executive Director.

15. Clyne exercises no prerogatives or powers which are inconsistent with his position as the largest single stockholder. Without the vote of stock owned by someone else, he cannot block sale of the

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<sup>14</sup>Wife of C. Terence Clyne

<sup>15</sup>Children of C. Terence Clyne

<sup>16</sup>Son of C. L. Clements, Sr.

<sup>17</sup>Children of W. Keith Phillips, Sr.

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station; he and his appointees own less than a majority of the stock and they cannot, by vote of their stock, control the corporation. Clyne cannot designate the majority of the Board of Directors and, lacking numerical superiority on the Board, they cannot control the Board of Directors or corporate policies. Finally, we note that Clyne has not furnished the loan of \$600,000 to Coral, but has merely obtained such a loan for the corporation; thus, he is not in the position of one who can control the corporation by virtue of his control of its finances. Cf. *Radio Associates, Inc.*, FCC 62-51, 32 FCC 166, 21 RR 368. We conclude, therefore, that there has been no transfer of *de facto* control of the corporation.

16. The only other question remaining is whether there has been a transfer of *de jure* control. Although voting control remains in the hands of the original stockholders, legal title to a majority of the stock has passed to others. We believe that such a situation con-



stitutes a technical transfer of control requiring the filing of an application for Commission consent. Coral has filed all of the facts with the Commission and its ownership reports, together with the pleadings filed in this matter, present the Commission with a complete picture which would enable the Commission to grant such an application had it been filed. It is clear that Coral made no attempt to conceal or misrepresent the facts with respect to control of the corporation, and we believe that the circumstances were such that reasonable men could differ as to whether there was a transfer of control. Coral's failure to file an application for our consent to the transfer of control was an excusable one and Coral should not be penalized for an honest error in judgment. See *Pacifica Foundation*, FCC 64-43, 1 RR 2d 747. We will require Coral to file a short-form application for transfer of control, but with all of the facts before us, we see no reason to defer action on the application now before us.

17. We find that no substantial or material questions of fact have been raised by the petitioners or the objector. We further find that the applicant is qualified to construct and operate as proposed and that a grant of the application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the petitions to deny filed herein by Storer Broadcasting Company and L. B. Wilson, Incorporated, and the informal objections filed by The Association of Maximum Service Telecasters, Inc., ARE DENIED.

IT IS FURTHER ORDERED, That the "Response to Petition to Deny Filed by Scripps-Howard Broadcasting Company" filed herein by Sunbeam Television Corporation, IS DISMISSED as moot.

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IT IS FURTHER ORDERED, That Sections 73.610(b)(1) and 73.685(a) of the Commission's Rules ARE WAIVED, and the above-captioned application of Coral Television Corporation IS GRANTED subject to conditions and in accordance with specifications to be issued.

IT IS FURTHER ORDERED, That Coral Television Corporation shall, within thirty (30) days of the date of release of this Order, FILE WITH THE COMMISSION an application on FCC short-form 316 for Commission consent to transfer of control of the corporation.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple  
Secretary

Adopted: February 8, 1967

Released: February 15, 1967

APPENDIX

Pleadings filed in this proceeding:

1. Petition to Deny, filed April 29, 1966, by Scripps-Howard Broadcasting Company, licensee of Television Broadcast Station WPTV, Channel 5, West Palm Beach, Florida. Withdrawn October 18, 1966.
2. Petition to Deny, filed April 29, 1966, by Storer Broadcasting Company, permittee of Television Broadcast Station WGBS-TV, Channel 23, Miami, Florida.
3. Petition to Deny, filed April 29, 1966, by L. B. Wilson, Incorporated, licensee of Television Broadcast Station WLBW-TV, Channel 10, Miami, Florida.
4. Informal objections, filed May 2, 1966, by The Association of Maximum Service Telecasters, Inc., pursuant to Section 1.587 of the Commission's Rules.
5. Opposition, filed May 12, 1966, by Coral Television, against (1), above.
6. Opposition, filed May 12, 1966, by Coral Television, against (2), above.
7. Opposition, filed May 12, 1966, by Coral Television, against (3), above.
8. Comments, filed May 17, 1966, by Coral Television, with respect to (4), above.
9. Reply, filed May 23, 1966, by Storer Broadcasting Company, to (6), above.
10. Reply, filed May 24, 1966, by Scripps-Howard, to (5), above.
11. Reply, filed May 24, 1966, by L. B. Wilson, to (7), above.

12. Reply, filed June 13, 1966, by AMST, to (8), above.
13. Supplement to Petition to Deny, filed June 29, 1966, by L. B. Wilson.
14. Petition for Waiver and Immediate Consideration and Grant of Application, filed July 6, 1966, by Coral Television.
15. Opposition, filed July 14, 1966, by Coral Television, to (13), above.
16. Comments and Partial Objections, filed July 19, 1966, by Scripps-Howard to (14), above.
17. Reply, filed July 21, 1966, by L. B. Wilson, to (15), above.
18. Letter, dated January 6, 1967, filed on behalf of L. B. Wilson, in connection with Coral's amendment of December 23, 1966.

In addition to the foregoing, a "Response to Petition to Deny Filed by Scripps-Howard Broadcasting Company" was filed June 3, 1966, by Sunbeam Television Corporation, licensee of Television Broadcast Station WCKT, Channel 7, Miami, Florida, a non-party to the proceeding.

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EXHIBIT E

SURVEY REPORT

PROPOSED PROGRAMMING

W C I X - T V CHANNEL 6

MIAMI, FLORIDA

## W C I X - T V

Programming Survey

Re: In lieu of the fact that WCIX-TV's original programming proposal was placed before the FCC more than seven years ago and in that the new tower height has been increased from three hundred feet to five hundred feet the following up-to-date survey has been made of both the old and new coverage areas.

Survey Period: February 1965 through September 1965.

Area: Old grade B coverage area and the new B contour.

Communities included in the survey: (28 communities)

Dade County

Miami  
South Miami  
Miami Beach  
North Miami Beach  
Coral Gables  
South Dade  
Florida City  
Homestead  
Princeton  
Cutler Ridge  
Perrine  
Kendall

Broward County

Dania  
Hollywood  
Ft. Lauderdale  
Pompano Beach  
Pembroke Pines  
Margate  
Hallandale  
Deerfield Beach

Monroe County

Tavernier  
Islamorada  
Upper Maticumbe Key  
Lower Maticumbe Key  
Marathon  
Key Largo  
Upper Key Largo

Palm Beach County

Boca Raton

Survey Method:

Two methods of survey were used to determine the needs and the desires of the communities in the WCIX-TV signal area and how best to serve them as an independent station.

The first method was a door to door survey by INDEPENDENT RESEARCH ASSOCIATES covering the areas from Deerfield Beach to the north to Homestead in the south. (See Appendix A)

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The second survey was conducted by the station in a personal interview with responsible people in both the old B contour and the new B contour. (See Appendix B for Sample Questionnaire and results of survey)

Miami, Florida

Surveyed: Druggist, Retired Businessman, Telephone Operator, Student, Housewife, Export-Import Agent, Building Manager, Bookkeeper, Secretary, Watchmaker, State Small Loan Examiner.

1.

(1) Four would like to see more Drama in entertainment, eight request Musical Variety, four would like to see more movies, and five ask for local talent shows.

Comment: "Light Drama." "More of the Broadway musical type, or musical comedy."

(2) Four would like to have more religious services and four request religious music.

Comment: "Nonsectarian, historical programs of actual occurrences in Bible, or review of religious faiths have been very interesting."

(3) Six request home gardening shows, three ask for more home planting tips. One request for Landscape Design and two requests for Market Reports.

Comment: "Things that make a good landscape design."

Special plants for special places, above all, program of plants causing allergies, poisoning, etc."



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(4) Under Educational, four would like to see more home study courses, three desire more school activities to be aired.

Comment: "Interesting historical programs, the Arts."

"New education methods being taught in schools at a time for parents, New Math program."

(5) All request more news shows with emphasis on national, regional and local. Four requests for more sports, three ask for more weather.

Comment: "Special reports re events happening now."

(6) Under Discussion four would like to see more political and local issues aired and five would like more interview type programs.

Comment: "Pre-election interviews and debates in national and local elections." "Medical." "Informing public of important happenings in their area and thorough information on issues to be voted on."

(7) Under Talks, nine would like to view more travelogues and three request lectures.

Comment: "Visits to art galleries, historical and important places in the world."

2. Under types of programs that could be developed for Miami: "Youth and Senior Citizen activities." "Bowling and Swim shows." "Schooling made available in the community should be developed. MOST IMPORTANT - is the education of the public re the everyday things we deal with: Law, Medicine,

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Architecture, perhaps financing problems, care of homes and property. Once the general public is informed on these matters the community in general becomes much more prosperous, up to date and the standards of such professional men become higher because more people desire and appreciate a higher standard of service, advice and a higher standard of living in general."

3. 4. Has your community been given a chance to be telecast on a regular basis? "Miami, yes." "South Miami, No."
5. Comment: "It is getting to a point where fairly educated people do not even wish to watch TV because of the GARBAGE that is presented. It seems to me that there is no reason why the public cannot learn to enjoy good entertainment instead of "Peyton Place" and slap-stick nonsense that even the average child does not enjoy ..... Most of all something should be done about some of the ridiculous commercials presented on TV." "More Spanish Programs." "No more old movies and broadcasting re-runs more than one time."

Dania

Surveyed: Executive Manager, Chamber of Commerce, Chief of Police, City Manager.

1. (1) All three request more musical variety shows and one requests talent show.
- (2) One would like to see more religious sermons.
- (3) Two ask for home gardening tips and planting tips and one desires market reports.

(4) Under Education, two would like to see more home study classes.

(5) Two would like to view more regional news, one asks for more local news.

(6) Three would like more local issues aired, two request more interviews.

(7) One requests more travelogues.

2. Under types of programs that could be developed for Dania:  
"Fourth of July Extravaganza, Dania Jai Alai, Marine Life, Fishing Tournament, Police."

3. 4. Facilities available: Recreation Hall, Dania Fishing Pier, Dania Jai Alai.

One says, "yes" and one says, "no" in response to question of community having opportunity to be telecast on regular basis.

5. Comment: "Advise you to make this a Broward County station. Three already known as Miami stations. Broward County people need more Broward County news and have a station of their own."

Miami Beach - North Miami Beach

Surveyed: Government Administration Aide, Vice President Bank, Police Chief, Chamber of Commerce Secretary, Tab Operator, Public Relations Administrator.

1.

(1) Under Entertainment, four desire more movies, four ask for more musical variety, one would like more talent shows.

(2) Four desire more religious music, one asks for more sermons.

(3) Four vote for a Home Gardening show under agriculture - one requests Planting Tips.

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(4) Under Education, three desire reports on School Activities, one asks for a Home Study course.

(5) All voted in the News category. Three would like to see more national, regional and local news, four would like to view more sports, two ask for more weather information.

(6) Under Discussion, four would like to see more local issues telecast, three would desire more political debates and two request regional issues to be aired.

(7) Four desire more travelogue type programs and one asks for lectures.

2. Under what types of programs that could be developed for Miami Beach and North Miami Beach are the following Comments:

"Youth Activities, Senior Citizen 'Golden Age' activities."

"Vets Parade. Baton Exhibition"

"Activities from Recreation Department."

"Restaurant Shows, Convention Events, Behind scenes events that make up operation of hotels, personnel, shows, etc."

3. 4. Facilities available: Hotels, Beach, Miami Beach Auditorium, Recreation Center, Olympic size swimming pool.

Miami Beach has had an opportunity to be telecast on a regular basis, North Miami Beach has not.

5.           Comment: "Documentaries badly needed during the week."  
The telecasting of local sports events when the teams are out of town as well as local golf, regattas, etc. Also of interest might be professional baseball and football games if the rights could be acquired." "More Spanish Programs."

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Margate - Pembroke Pines

Surveyed: Mayor, Executive Director, Consulting Engineer.

1.

(1) Two request more movies under Entertainment, two ask for more musical variety and one asks for more drama and talent shows.

(2) Under Religion, one requests music and one requests sermons.

(3) Three ask for more Planting Tips, one desires Market Reports and one asks for Home Gardening.

(4) All would like to see more School Activities reported and one requests Home Study courses.

(5) Under News, all request more news coverage particularly Regional, National, local and sports and weather.

(6) Under Discussion, all three request more interviews, political issues, local issues and one requests more regional issues.

(7) Two would like to see more travelogues and two requests for more lectures.

2.

Types of programs that could be developed for Margate and

Pembroke Pines: Comments: "Youth and Senior Citizen activities."

"4th of July Festivities." "Annual Pembroke Pines Day Festivities - combines all types of joint community projects for all ages."

3. Facilities available: Recreation Hall, Civic Center, J. F. Kennedy Park, North Perry Airport.
4. Communities have not been given a chance to be telecast on regular basis.

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5. Comment: "Might be interesting for programming --- How communities can benefit by planning with Federal Government Housing Finance Agency."

Hollywood

Surveyed: Recreation Superintendent, Chamber of Commerce Vice President, Mayor.

1.
  - (1) Under Entertainment, one wanted movies, two wanted musical varieties and drama.
  - (2) One requested more religious services and one desired more religious music.
  - (3) Under Agriculture, one requested a show featuring home planting tips.
  - (4) One asked for more reports on school activities.
  - (5) All three requested more local news and weather and more national and regional news. Two requested more sports.
  - (6) Two requested more political issues be telecast and one desired more local issues be discussed.
  - (7) One request asked for more travelogues.

2. Under programs that could be developed for the community were listed: Parimutuals, Mens and Womens 4 ball Golf Tournament, Irish Fair, Hollywood Pro-tennis challenge cup, Seven Lively Arts Festival, Home Show, Pops Concert, Band Clinic,
3. with listings of several community halls to be used for telecasting such events.
4. Comments under question as to whether community has been given opportunity in the past to be telecast on a regular basis: "No, only for special events." "No, we have tried

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to get better coverage for Broward County from all the other stations with little or no success."

5. Comment: "More Hollywood Area News coverage is priority need."

Ft. Lauderdale

Surveyed: City Government Official, Travel Agent, Secretary, Legal Secretary; President, Business Machine Company.

1.
  - (1) Five want more movies, drama and musical variety. One asked for live plays.
  - (2) No comment.
  - (3) No comment.
  - (4) No comment.
  - (5) All desired more news coverage with emphasis on national, regional and local news. Two request more sports and weather.
  - (6) Four asked for more interview discussion programs, three want to see more political issues aired and two request local issues.



(7) Three would like to see more travelogues and one requests lectures.

2. Under the question of types of programs that could be developed for the Ft. Lauderdale community, the following answers were given: Annual Promenade de Paris, Blue Marlin Tournament, Boating Shows, Boat Races, Beaux Arts, Symphony, Little Theatre, Civic Music Association, Senior Citizens Program, Local Sports.

3. Facilities available were listed as War Memorial Auditorium, Ft. Lauderdale Yankee Stadium, Lockhart Stadium, Holiday Park Building.

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4. "News Only" listed for community opportunity to be telecast on regular basis.

5. Under additional comments the following were noted: "Not enough Ft. Lauderdale News." "Calendar of Events - local, city and Ft. Lauderdale - much needed." "Spots covering driving rules, laws and courtesies. Local driving problems."

Pompano Beach

Surveyed: Beauty Salon Operator, Insurance Agent, Executive - Auto Parts Business, Postal Clerk, Personnel Director of City.

1.

(1) All desired more entertainment in movies, musical variety, drama and one requested talent shows.

(2) Two would like to view more religious services and three asked for more religious music.

(3) Two would like home gardening tips and growers comments.

(4) Four would like to see more local school activity reports.

One requests home study courses.

(5) All would like to see more news coverage particularly on a regional and local level and include sports and weather coverage.

(6) Four request more discussion programs on local issues, more interview programs and political issues.

(7) All would like to see more travelogue programs and one would like to have more lecture type programs.

2. Under types of programs that could be developed for Pompano Beach area the following answers were given: Pompano Park Harness Races, Local Football games, Bean and Pepper Festival.

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3. Facilities available were given as: High School Gym, Washington Senators Training Center, Municipal Golf Course, First Baptist Church Recreation Center.
4. Community has not been given opportunity to be telecast on regular basis.
5. Additional comments were listed as: "Not enough attention is given to Broward County." "On special events and sports too much shown on all channels." "More coverage needed for Pompano Beach area." "Too much duplication on channels 5-7-10-12."

Hallandale

Surveyed: City Manager, Vice President Chamber of Commerce, Postmaster.

1. (1) All requested more entertainment. Two asked for more musical variety, one desired to see local talent shows and movies.

(2) Three requested more sermons and one asked for religious music programs.

(3) Under Agriculture, two want more home gardening shows, and one requested planting tips.

(4) There were two requests for home study courses and two requests for school activity reports.

(5) All request more news coverage on local, national and regional levels. Two desire more sports coverage and one comments, "Surfing forecasts (waves)."

(6) All would like to see more local issues discussed and two request regional issues. One asked for more political.

(7) One request for lectures and one request for travelogue.

[509]

2. Under types of programs that could be developed for Hallandale the following were listed: Senior Citizen activities, Annual Mothers Council Christmas Party, Derby Day Week, Easter Egg Hunt, Surfing Competitions.

3. 4. Facilities available were listed as: Gulfstream Park, Hollywood Kennel Club, Recreation Hall, City Park, Olympic Swimming Pool, local school auditorium.

5. Additional comments: Local Chamber of Commerce would welcome opportunity to sponsor programs on community development, local issues, etc."

Deerfield Beach

Surveyed: Manager-Chamber of Commerce, Fireman, Hardware Store Proprietor, Postmaster, City Manager.

1.
  - (1) Four requested more musical variety, three would like to see more musical variety, and three would like to view local talent shows.
  - (2) Three desire more religious music and one asks for more sermon programs.
  - (3) No comments.
  - (4) One request for more school activity reports and one request for home study courses.
  - (5) All would like to see more news on the local, national and regional levels. Four requests for more sports and weather.
  - (6) Two would like to see more political issues debated and two request local and regional issues.
  - (7) One request for more lectures.

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2. For types of programs to be developed for Deerfield Beach the following comments were made: Deerfield Beach Recreation Center Activities. Cracker Day. Home of Pittsburgh Pirates. Annual Festivities.
3. Facilities available: New Stadium, Recreation Hall
4. Community has not been given opportunity to be telecast on regular basis.
5. Additional Comments: "Overlapping of programs from channels 10 and 12 and channels 5 and 7." "Needless duplication of

programs from channels 5 and 7 and channels 10 and 12."

"Channels 5 and 7 overlap one another." "Duplication of channels."

Coral Gables

Surveyed: Secretary-Public Schools, Administrative Officer-Internal Revenue Service, Postal Clerk.

1.

(1) All would like to see more Drama. One requests musical variety.

(2) Two request more religious sermons and one requests more religious music.

(3) Two requests for more home gardening shows and one desires home planting tips.

(4) Two would like to view more school activity programs and one request for home study series. Additional comments: "Good coverage needed in acquainting public with evening courses University Center and Youth Center. Local papers won't print schedules."

(5) Two would like to have more local news and one requests additional local, regional and national news with more sports and

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(6) Two would like to see more interviews, political, local and regional issues on the air.

(7) All would like to have more travelogues and one request for more lectures.

(8) Comment: "Interviews and discussions to assist Senior Citizens particularly in Medicare, social security and info on retirement centers (rates, etc)."

2. Types of programs that could be developed from Coral Gables:  
"Annual Festivities. Youth and Senior Citizen Activities."  
"The Youth Center Activities might be interesting (square dancing, etc.) When the Youth Center plays host to orchid shows, etc., programs might be developed from there." "High interest on high school football games." "Anything to get away from the wasteland that TV still is, i.e. cowboys, family comedies, and song and dance."
3. Facilities available: Stadium, Youth Center, Junior and Senior High School auditoriums.
4. Community has not been given opportunity to be telecast on regular basis.
5. Comment: "Would welcome programs suitably timed to attract teenagers that might combine 'their' kind of music, dancing with some sort of additional "message" occasionally brought in." "Commercials, as is, are below the norm for adult appreciation -- could be improved upon greatly." "Why are so many programs aimed at children and teenagers who do not have the purchasing power advertisers are looking for."

South Miami

Surveyed: Hobby Store Owner; Manager Furniture Company, Western Union Agent, Owner-Travel Agency, Owner-Electronics Store.

1.

(1) All would like to view more entertainment. Five desire more drama. Three would like more movies and three request more musical variety and two would like to see more talent shows.

(2) Two request more religious music, three ask for more religious services.

(3) Four ask for more home gardening shows and two would like to include market reports. Comment: "A How to-do-it Show".

(4) Three ask for school activity reports and one requests a home study course.

(5) All request more newscoverage particularly on the national, regional and local levels. Three ask for more sports and four would like to see more wather forecasts.

(6) All would like to have some discussion programs in political, local and regional issues.

(7) Five ask for more travelogues and one would like to have more lectures.

2.

Under types of programs that could be developed for South Miami: "Youth and Senior Citizen Activities." "High School and Junior College sport shows - especially track and swimming." "Annual Festivities. Local interests - promotional ideas, etc." "Man on the Street."

3.

Facilities available: Stadium. All facilities available except those for out-door winter sports.



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4. Community has not been given opportunity to be telecast on regular basis.

5. Comment: "Please less reruns of movies in summertime."

Boca Raton

Surveyed: Music Dealer, City Manager, Carpet Store Manager, Manager - Chamber of Commerce.

1.
  - (1) Three desire more musical variety under entertainment. One asks for more drama and one requests more movies.
  - (2) One requests more religious services and music.
  - (3) Two would like more home gardening and planting tips and one would like to see market reports and growers comments.
  - (4) Under Education, one requests more home study courses and three would like to see more school activities on the air.
  - (5) All request more news shows with emphasis on national, regional and local coverage. Two would like to see more sports and weather.
  - (6) All would like to have an opportunity to view more interviews, two desire more political and two request more local issues.
  - (7) Three ask for more travelogue programs and one requests more lectures.
2. Under programs that could be developed for Boca Raton:  
"Golf." "Youth Programs from Community Center." "Water Polo."  
"Boca Raton Spanish Festival."
3. Facilities available: Community Center, Polo Ground, Florida Atlantic University, Golf Course, Bibletown Auditorium, New High School Football Stadium.

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4. Community has not been given opportunity to be telecast on regular basis.
5. Comment: "Duplication on channels 5 and 7 and 10 and 12 leads us to believe another channel with different programs would be well received." "Duplication of channels 5 and 7." "Duplication of 5 and 7 and 10 and 12."

Perrine - Cutler Ridge

Surveyed: Superintendent Post Office, Executive Director, South Dade Agriculture and Water Resources, Real Estate Agent, Bank Manager, Bowling Lane Manager, Vice President - Bank, Postmaster.

1.

(1) All would like more entertainment. Five request more musical variety, three request more drama, and four ask for more local talent shows.

(2) Three request more religious music programs.

(3) Under Agriculture, four ask for more growers comments, five request planting tips, one requests a show on farming Implements and one asks for market reports.

(4) Under Education, three request home study and two would like to have more school activities telecast.

(5) All would like to have more newscasts to view. Four desire more local and national news, three would like to have more sports and wather reports.

(6) Five would like to have more local issues for discussion and two request more regional debates, two would like more interview programs.

(7) Seven would like to see more travelogue shows and one requests lecture programs.

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2. Types of programs that could be developed for Cutler Ridge - Perrine area: "Youth and Senior Citizen." "Perrine Khoury League." "Agricultural news." "Live coverage of club meetings." "Senior Citizens Program from East Ridge Village."
3. Facilities available: Baseball Field. Perrine-Cutler Ridge Community Hall. Cutler Ridge Recreation Hall. Teenage Dance Center.
4. Communities have not been given opportunity to be telecast on regular basis.
5. Comment: "More programs that combine entertainment with information and knowledge." "We think TV is an entertaining medium and we welcome Channel 6 in this area." "An independent station will be good for this area." "Local news and events should be given more coverage. National news is interesting however it does not always concern us."

Homestead

Surveyed: Secretary-Chamber of Commerce, City Manager, Insurance Agent, Auto Dealer.

(1) Under Entertainment, three would like to view more movies, two request more drama, one asks to see more musical variety and one would like a local talent show.

(2) Two would like more religious music and one requests sermons, two ask for more services.

(3) Under Agriculture, three would like to have more home gardening shows, two would like market reports, three desire growers comments, and two would like to have farm implements and planting tips as a regular feature.

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(4) Three request more school activity reports and two ask for home study courses.

(5) All would like to see more news coverage and one particularly asks for Homestead news. Three desire more sports and weather.

(6) Under Discussion, three ask for more local discussion of immediate issues and three request more political issues. One requests regional issues.

(7) Three request more travelogues and one requests lectures.

2. Types of programs that could be developed for Homestead:  
 "Dade County Fair Exposition." "Homestead Rodeo" "Annual Art Show." "Youth and Senior Citizen." "Youth Activities; Vet Benefits."
3. Facilities available: Recreation Hall, National Guard Armory, Field House and Stadium, Homestead Municipal Park, Swimming Pools.
4. Community has not been given opportunity to be telecast on regular basis.
5. Comment: "During recent hurricane coverage on 'Betsy' Homestead was practically never mentioned and we had to draw our own weather conclusions. Yet, Homestead had winds clocked by the Air Force Base at 144 MPH and damage was extensive, particularly to agriculture - 90 to 95 percent of avocado and lime crops were lost. Loss ranged from 50 to 100% on various crops."

Princeton - Kendall

Surveyed: Realtor, TV Repair Shop Owner, Merchant, Bank Cashier.

1.

(1) Under Entertainment, two request musical variety type shows, one requests Drama and one asked for more talent shows.

(2) Under Religion, one desires more music and one comments: "Explanation of different religions."

(3) Under Agriculture, two request more home gardening pointers and two request growers comments, one asks for market reports and one comment: "Household Hints."

(4) Two ask for home study courses under Education.

(5) All desire more news coverage - national, local, regional. Two ask for more weather coverage.

(6) Under Discussion, two requests for more interviews, three desire more local issues to be covered and one request for political issues.

(7) Two requests for travelogues.

2.

What programs do you think could be developed from Princeton - Kendall area? No comments.

3.

Masonic Hall available for shows.

4.

Communities have not been given opportunity to be telecast on regular basis.

5.

Comment: "A New TV channel will be a definite asset to the people of South Florida." "I feel that weekend duplicating of sports ruins viewing." "Would prefer movies eliminate sex. Average childrens movies and programs at early hours 5:00 pm to 8:30 pm."

Florida City

Surveyed: Service Station Owner, Superintendent - Post Office,  
City Manager.

1.

(1) Under Entertainment, all desire more drama, two request more movies, two request musical variety and one requests talent shows.

(2) All desire more sermons and religious music, two ask for full religious services.

(3) All would like to have market reports aired, three ask for home gardening and planting tips and one requests farm implements as a feature.

(4) All request more reports on school activities, two desire home study and school reports.

(5) All want full news coverage including more national, regional and local news plus sports and weather.

(6) Each requests more political, local and regional issues for Discussion. One asks for more interviews.

(7) All want to see more travelogues and one asks for lectures.

2.

Under types of programs that could be developed for Florida City:  
"Annual Festivities." "Home and Garden Show." "Youth and Senior Citizen." "Firemens Fair."

3.

Facilities available: Community House, Florida City Raceway, Florida City Park, Tom Harris Ball Park.

4.

Community has not been given opportunity to be telecast on regular basis.

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5. Comment: "During Hurricane Betsy the news centered about Miami and Miami Beach ... Common Complaint." "As a resident of this area this general area does not receive the attention it should in local affairs." "This city does not receive justified publicity."

Florida Keys -- Upper Key Largo, Key Largo, Tavernier, Islamorada

(Upper and Lower Matacumbe Keys), Marathon

Surveyed: Post Office Clerk (Upper Key Largo), Real Estate Developer, Appliance Sales and Service, Bookkeeper, Postmaster, Trailer Shop Owner, Postal Clerk (Islamorada), Secretary, Chamber of Commerce, Motel Owner, Manager - Electric Coop,

1:

(1) Six would like to see more Drama under Entertainment, six desired more movies, eight ask for more musical variety, one would like more talent shows and one comments, "series."

(2) Five request more musical religious programs, one requests sermons.

(3) Four ask for more home gardening shows, two request growers comments and three ask for planting tips.

(4) Under Education, four request home study courses, two desire school reports, and four ask for school activities reports.

(5) All request more news coverage particularly in regional, national and local news coverage. Six ask for more weather information, five desire more sports coverage and one comment: "Fishing".

(6) Under Discussion, six ask for more interviews, ten request more local issues, four would like to see more political issues.



(7) Eleven desire to see more travelogues and one asks for lectures.

2. Under what types of programs do you think could be developed for your community. Comments: "Any subject to do with aquatic activities." "Pennekamp State Park, Local Fishing." "Key Largo Fishing Tournament." "Fishing." "Garden Show." "Kickoff banquet for Metropolitan Miami fishing tournament." "Fishing, diving, nature trail." "Scuba diving." "Boating and Sailboating."
3. Facilities available: Underwater coral reef, nature trail, Recreation Hall (Marathon), Intercoastal channel (Islamorada), Alligator Reef State Park, Toll Gate Inn, Key Largo Civic Club, Coral Shores School, BPCE (Key Largo), Theatre by the Sea (Islamorada), High School (Tavernier).
4. Communities have not been given opportunity to be telecast on regular basis.
5. Comment: "Happy to have another TV station with good reception." "Chamber of Commerce looks for broader TV coverage." "Book 'They Called it Tropical' exploits complete history of Florida Keys." "Welcome the choice of a new channel in this area." "Local channel is badly needed." "New station in this area highly appreciated."

Survey Conclusions:

This survey covered twenty-eight communities in three counties included in the Grade B signal area based on the increased tower height of WCIX-TV.

Summary of Answers to survey:

1. Entertainment. All interviewees indicated they would like more entertainment. They designated movies, musical variety, and talent shows in that order.
2. Religion. The majority showed a preference for more religious music, sermons and services respectively.
3. Agriculture. Everyone did not respond to this question however, those that did checked in order of preference Home Gardening, planting tips, and Growers Comments.
4. Education. Parents responded to this question asking for School Activities, School Reports and Home Study Courses.
5. News. There was a unanimous response requesting more news in Local, National, Regional, Sports and Weather reports in that order.
6. Discussion. A majority answering this question asked for Local Issues, Political Issues, Regional Issues, and Interviews.

7. Talks. The majority who responded to this question indicated almost without exception their desire for more travelogues.

The general overall preference in all categories in their order of response

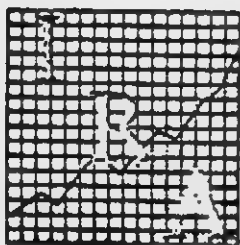
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| is: (1) News (all areas) | (12) School Reports   |
| (2) Movies               | (13) Home Gardening   |
| (3) Travelogues          | (14) Planting Tips    |
| (4) Musical Variety      | (15) Religious Music  |
| (5) Talent Shows         | (16) Interviews       |
| (6) Local Issues         | (17) Home Study       |
| (7) Political Issues     | (18) Sermons          |
| (8) Drama                | (19) Services         |
| (9) Regional Issues      | (20) Growers Comments |
| (10) Interviews          | (21) Market Reports   |
| (11) School Activities   | (22) Lectures         |
| (23) Farm Implements     |                       |

8. To the question of "What Types of Programs do you think could be developed from your neighborhood or community"?, there was an enthusiastic majority response from all interviewees. Each is desirous of seeing home community activities ranging from parades and holiday festivities to community activity projects.

9. Under facilities available they listed all community gathering places such as auditoriums, parks, schools, playgrounds and even airports if parks were not available.

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10. When asked if their community has had an opportunity to be telecast on a regular basis in the past only two communities out of 28, Miami and Miami Beach, responded affirmatively.
11. Additional Comments were exceptionally enlightening. They ranged in every area from suggestions for programming and complaints about the adolescence of commercials to genuine concern over duplication of network programs between West Palm Beach and Miami stations. There were many comments welcoming the addition of a new station in the area.



# INDEPENDENT RESEARCH ASSOCIATES

2980 MCFARLANE ROAD

COCONUT GROVE

MIAMI 33 FLORIDA

PHONE 445 3505

## PREFACE

The following report is an analysis of a survey of 580 interviews conducted by Independent Research Associates, Inc. for WCIX-TV of Miami. Respondents to the survey were a random sample of Dade and Broward County residents.

The intent of the survey was to determine the answers to two distinct objectives. First, what types of local activities, which could be produced by WCIX-TV's mobile studios, would the general South Florida public be interested in viewing. Secondly, of the programs which they now receive from the network channels, what categories of programs would they like to see more often.

This research is not designed as a rating system of how many viewers would be watching a particular type of program on a specific night. Rather it was prepared to give WCIX-TV a scientific study of the attitudes and opinions of South Floridians toward television programming.

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## ANALYSIS

The following table shows the attitudes and opinions of South Floridians toward their selection of what they would enjoy viewing on WCIX-TV. These results are based on question # 1 of the interview schedule which will be found in the Appendix.

TABLE I  
PROGRAMMING PREFERENCE FOR WCIX-TV\*

<u>Category of Programs Desired</u>	<u>Total Sample</u>	<u>TV Owners (97% Sample)</u>
Governmental and Political meetings, (county and city commission, school board and political forums)	37.4	37.5
Local Sports Events(boxing, fishing tourn., Marlins, UM'sports, boating)	36.2	36.5
Cultural Programming(local musicals, drama, discussions and floral arrangements)	25.8	26.3
Educational Programs(math, languages, and practical skills)	20.2	20.3
High School Activities	9.7	10.0
Attractions and Points of Interest (Viscaya, Interama, Seaport)	8.6	8.5
Homemaking(culinary hints,decorators, gardening)	8.3	8.2
Religious Programs Church activities and special religious programs)	4.7	3.6
Local Club Activities(women's clubs, Kiwanis, League of Women Voters, etc.)	3.6	3.7
Had No Opinion	<u>14.8</u>	<u>14.4</u>

\* The totals add to more than 100% because each respondent was allowed three choices if he so desired.

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An intense interest was shown for the telecasting of governmental and political meetings. Probably the most mentioned was Dade County Commission meetings with municipality commission meetings and school board meetings next most frequently. Also of interest appeared to be non-candidate sponsored political meetings with all candidates in a particular race present.

Additionally, local cultural and sports activities would probably draw large audiences for WCIX-TV. Most often mentioned culturally were UM dramatic productions, special productions brought to the Dade and municipal auditoriums, and special discussions on timely topics utilizing local experts.

In terms of sports, all UM sports appeared to be desired as well as Marlin baseball. Also of interest appeared to be the outdoorsmen sports of fishing, boating and auto racing.

TABLE II shows the preferences of South Floridians on regular broadcasting programming and what they would like to see more of. These answers were coded into the categories set forth by the Federal Communication Commission in FCC Form 301.



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TABLE II  
PREFERENCES FOR ADDITIONAL (REGULAR) PROGRAMMING\*

<u>Category of Programs Desired</u>	<u>Total Sample</u>	<u>TV Owners (97% Sample)</u>
Entertainment(include here all programs which are intended primarily as entertainment, such as music, drama, variety, comedy, quiz, breakfast, children's, etc.)	68.3	69.3
Religious(include here all sermons, religious news, music, and drama)	3.4	3.4
Agricultural(include here all programs containing farm or market reports or other information specifically addressed to the agricultural population)	.2	-
Educational(include here programs prepared by or in behalf of educational organizations, exclusive of discussion programs which should be classified under (6) below)	16.7	16.1
News(include here news reports and commentaries)	15.9	15.7
Discussion(include here forum, panel and round-table programs)	15.9	16.4
Talks(include here all conversation programs which do not fall under points 2,3,4,5,or 6 above, including sports)	16.9	16.5
Other(miscellaneous)	1.2	1.3
Had No Opinion	<u>11.0</u>	<u>11.0</u>

\* The total adds to more than 100% because each respondent was allowed three choices if he so desired.

## METHODOLOGY

The sample <sup>design</sup> ~~design~~ for this survey was a multi-stage area probability sample, with a systematic system used to select the individual household units and a quota system to determine which member of the household to interview.

First, the two counties, Dade and Broward, were broken down into geographical areas. These units were then consecutively numbered in a serpentine fashion and every nth unit was selected. The number of units selected from each area was proportioned to that area's population of the total county.

Second, each four square block unit was given a random starting point determined by a table of random digits. Interviewers were instructed to interview at every other household until a total of twelve interviews were completed.

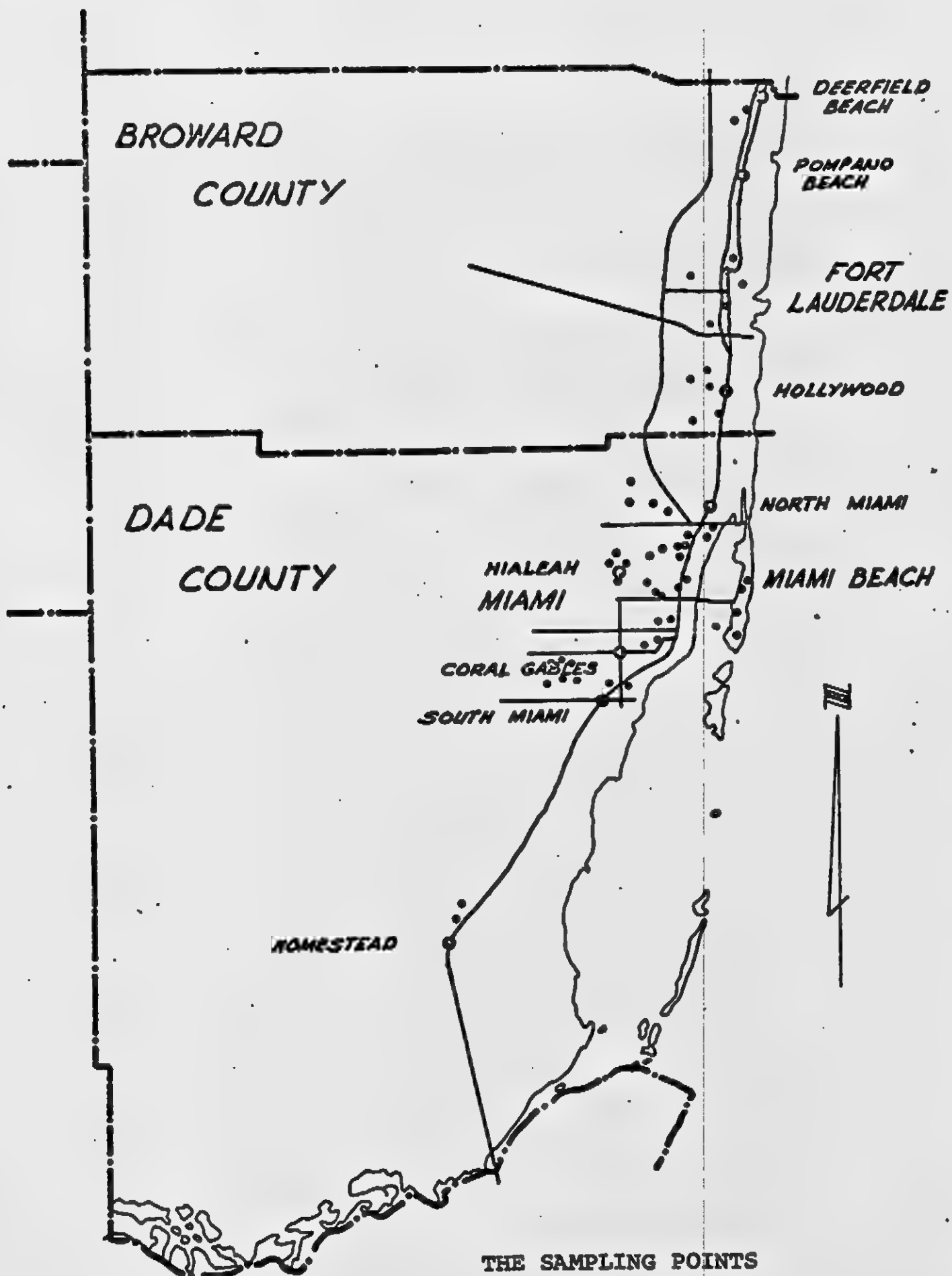
Because of the weather during the field work and the deadline for this report, it was not possible to complete one of the sampling units in Broward County. This should not bias the results to any great extent.

The personal interview method was utilized in gathering the information.. Field work was conducted by Independent Research Associates, Inc. regular field staff.

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The raw results were coded and punched on to data processing cards and analyzed by machine tabulation and cross-tabulation.

The maximum sampling error (occurring around 50%) is  $\pm 4.8$  percentage points for the total sample. The maximum error for specific segments of the population will be somewhat larger.



INDEPENDENT RESEARCH ASSOCIATES, INC. Feb. 1965

Survey 5B

## INTERVIEWER: READ THIS STATEMENT

South Florida has a new television station -- Channel 6 - WCIX-TV -- that plans to be on the air by mid-year. As the only independent television station in Florida, the station plans to show all types of local community activities as a part of its regular programming. These programs might be any worth-while and interesting activity which your city or county might be doing. This type of programming will be conducted by Channel 6's mobile studios which will go directly to the meeting or activity and tape it on the spot.

- 1- Based on your knowledge of the community, what activities, meetings, so forth do you think could be broadcast from your neighborhood, business area or community? (Interviewer: If respondent hesitates, ask "What types of programs such as city commission meetings, sports events, or garden shows, would you and your neighbors be interested in watching?")

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_ 1,2,3-

- 2- I'm sure you know what programs are now shown in South Florida; what kinds of programs would you like to see more of? (Interviewer: "or don't receive but would like to?")

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_ 4,5,6-

- 3- Is there a television set in your home?

Yes \_\_\_\_\_ 7-1  
 No \_\_\_\_\_ -2

On October 14, 1965, Coral Television Corporation increased its issued stock from 100 shares to 500 shares, and the full 500 shares have been issued as shown in this ownership report. The stockholders prior to that date acquired a total of 300 shares amounting to 60% of the issued stock, with the right to elect four directors. Mr. C. Terence Clyne (and members of his family) acquired a 40% interest in Coral Television Corporation as shown in this report, with the right to elect three directors. Mr. Clyne was designated Executive Director with responsibility for implementing the decisions and policies of the Board of Directors. Attached hereto is a conformed copy of the Agreement between Coral Television Corporation and Mr. Clyne pursuant to which the latter acquired the interest set out above.

The consideration for stock issued the Coral stockholders other than Mr. Clyne and his family is shown to be \$875 per share. This represents the average amount per share paid by each of such stockholders for the stock he now holds. Payment for the recently issued shares of stock was made in the form of cancellation of corporate obligations to the stockholders, by stockholders other than Messrs. Johns, Swetman (and family) and Clyne (and family), such obligations representing amounts the stockholders had advanced to the Corporation prior to October 14, 1965. In the case of Messrs. Johns and Swetman, stock was issued for services which had been rendered to the Corporation. Mr. Clyne (and family) paid cash for their stock at the time of issuance of such stock.

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STOCK PURCHASE AGREEMENT

THIS AGREEMENT, made and entered into as of this 14th day of October, 1965, by and between CORAL TELEVISION CORPORATION (hereinafter sometimes "Coral" or "the Corporation"); all of the officers, directors, and stockholders of Coral, in their capacities as such and individually who are: Leon McAskill, Robert L. Johns, Leo Robinson, Robert A. Peterson, Cameron Stewart, Arthur Adler, W. Keith Phillips, Edwin H. Hill, Jr., Executor of the Estate of Edwin H. Hill, Deceased, C. L. Clements, Sr., and Norman Swetman (hereinafter sometimes referred to, collectively as "Majority Stockholders"); and C. Terence Clyne (hereinafter sometimes referred to as "Purchaser").

WITNESSETH:

WHEREAS, Coral now holds a construction permit from the Federal Communications Commission (hereinafter sometimes "Commission" or "FCC") authorizing construction of a new television station to operate on Channel 6, at South Miami, Florida, with call letters WCIX-TV (hereinafter sometimes "WCIX-TV"); and

WHEREAS, Coral is a corporation validly organized and existing under the laws of the State of Florida and is authorized to issue Five Hundred (500) shares of Common Stock, no par value, one (1) vote per share; and



WHEREAS, there are now issued and outstanding One Hundred (100) shares of the stock of Coral to the following named persons who are also all of the officers and directors of Coral as set forth below:

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	<u>Office Held</u>	<u>Director</u>	<u>No. of Shares Held</u>
Leon McAskill	President	Yes	11
Robert L. Johns	Vice President	Yes	8
Leo Robinson	Vice President	Yes	11
Robert A. Peterson	Secretary-Treasurer	Yes	11
Cameron Stewart	None	Yes	11
Arthur Adler	None	Yes	11
W. Keith Phillips	None	Yes	11
Edwin H. Hill, Jr.	None	Yes	11 (As Executor)
C. L. Clements, Sr.	None	No	11
Norman Swetman	None	Yes	<u>4</u>
			100

WHEREAS, it is contemplated that an additional 200 shares of stock of Coral will be issued to the persons shown in the preceding paragraph as provided for in this Agreement so that each will hold a total of the following number of shares in Coral:

<u>Name</u>	<u>No. of Shares</u>
Leon McAskill	30
Robert L. Johns	30
Leo Robinson	45
Robert A. Peterson	30

Cameron Stewart	30
Arthur Adler	30
W. Keith Phillips	30
Edwin H. Hill, Jr.	30 (As Executor)
C. L. Clements, Sr.	15
Norman Swetman	30

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WHEREAS, the stock listed in the preceding paragraph will have been paid for at eight hundred seventy five dollars (\$875) per share except in the cases of Johns and Swetman to whom eight (8) and four (4) shares have been issued, respectively, in consideration of services rendered to the Corporation and the additional shares shown in the immediately preceding paragraph for Messrs. Johns and Swetman will be issued for services rendered to the Corporation; and

WHEREAS, each of the following named persons have executed stock subscription agreements containing rights to subscribe to, and purchase, such additional shares of Coral's stock as listed below next to each subscriber's name by paying therefor one thousand dollars (\$1,000) per share and there are no other valid rights now existing to subscribe to, or otherwise acquire, any of the stock of Coral except as indicated below:

<u>Subscriber</u>	<u>No. of Shares</u>
C. L. Clements, Sr.	5
W. Keith Phillips	25

Robert A. Peterson	25
Leon McAskill	25
Cameron Stewart	25
Edwin H. Hill (Estate)	35
Arthur Adler	35
Leo Robinson	<u>35</u>
	210

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WHEREAS, the parties hereto desire, in accordance with the terms and conditions hereinafter set forth and for the considerations hereinafter specified, that Purchaser shall acquire, by the payment to Coral of cash or certified check on the Closing Date (hereinafter defined), shares of the Common Stock of Coral as provided hereinafter, and that Majority Stockholders of Coral shall increase their present stock in Coral as set out above and shall otherwise give up their aforesaid rights to subscribe to any of the stock set forth in the immediately preceding paragraph, and that these rights set forth in the immediately preceding paragraph shall be cancelled with the execution of this agreement and the closing thereunder.

NOW THEREFORE, in consideration of the mutual promises herein contained and other good and valuable considerations, it is agreed as follows:

1. Preambles. The preambles to this contract constitute a part of the Agreement between the parties and are incorporated by reference herein and made a part hereof as re-

presentations and warranties by the parties hereto.

2. Closing Date. The transactions agreed upon herein shall be effectuated on October 14, 1965, at 10 AM and shall take place at the offices of the Corporation in Miami, Florida.

3. Stock of Majority Shareholders and Purchasers. On or prior to the Closing Date Coral shall have duly issued a total of 300 shares of its stock to majority stockholders as fully paid and non-assessable as set forth in the Preamble hereto, for which the said stockholders except Messrs. Johns and Swetmen shall have paid \$875 per share; the said stock issued to Messrs. Johns and

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Swetman shall have been issued for services rendered to Coral. On the Closing Date, Coral shall deliver to Purchaser 200 shares of its Common Stock so that Purchaser shall acquire 40% of the stock in Coral issued and outstanding on Closing Date; which stock shall be free and clear of all liens, encumbrances and conditions and shall be accompanied by opinion of counsel acceptable to Purchaser that the issuance of said stock is consistent with the requirements of this paragraph; that all corporate and other action necessary to effect a valid issuance of the stock has been taken; and that said stock has been duly and validly issued as fully paid and non-assessable in a manner consistent with the laws of the State of Florida and other applicable laws, including Federal Statutes and regulations. On the Closing Date, Purchaser shall pay to Coral, in cash or certified check, one hundred fifty thousand dollars (\$150,000) for the shares of its stock to be issued to Pur-

chaser in accordance with this paragraph. At Purchaser's election such shares of stock may be issued to himself, his wife and his children in such amounts as Purchaser may designate.

4. Waiver of Prior Subscription Rights and Rights of First Refusal. Majority Stockholders hereby jointly and severally agree that their present individual and collective subscription rights to acquire additional shares of the stock of Coral are set forth fully, completely and entirely in the preamble of this Agreement, and that they will not assert subscription or other rights respecting the acquisition of stock in Coral held prior to the

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Closing Date other than as specifically provided for in this Agreement. Majority Stockholders, jointly and severally hereby expressly waive any rights that they may have had prior to the effective date of this Agreement to acquire additional stock of Coral, other than as specifically provided for in this Agreement and in Article III of Coral's Articles of Incorporation.

5. Loan to be Obtained by Purchaser. Purchaser as additional consideration for the agreements and undertakings of Coral and Majority Stockholders herein, shall, as of the Closing Date, have obtained for Coral an effective commitment for a loan or line of credit of up to six hundred thousand dollars (\$600,000), available after Closing upon written request of Coral's Board of Directors as it may deem such funds to be required for construction and operation of WCIX-TV, except as otherwise provided herein, to be secured from a source acceptable to Majority Stockholders and

upon conventional banking terms. Said loan shall be evidenced by a promissory note of Coral, secured by pledge of 100% of the Coral stock and shall be payable in semi-annual payments to extend over a period of four years commencing one year after date of borrowing. Interest only shall be payable during the first year after borrowing, provided however: (1) the said loan or line of credit may be subordinated to such lien, mortgage or conditional sales agreement as may be issued by Coral to secure obligations incurred in the purchase of equipment or other major assets needed for the construction of WCIX-TV and the commencement of operation

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and (2) any loan made hereunder may be subordinated to a short term revolving loan of up to \$100,000 which may be made by Coral if, and as, determined by its Board of Directors.

6. (a) Loan as a Condition Precedent. As a condition precedent to any and all liabilities, responsibilities or duties of Coral and Majority Stockholders under the terms of this Agreement, Purchaser shall submit to Coral and to Majority Stockholders, prior to or at Closing Date, evidence satisfactory to two-thirds of the Majority Stockholders sufficient to establish that the loan described in Paragraph 5 hereof will be available to Coral on the terms and conditions described in the said paragraph 5.

(b) It is further agreed and understood that Purchaser will obtain the loan or line of credit described in Paragraph 5 hereunder prior to the Closing Date and that the availability of such loan or line of credit to Coral shall be shown by actual commitment of the lender to Coral which shall be effective

upon the Closing pursuant to this Agreement. The loan or line of credit provided for in Paragraph 5 hereunder shall not be availed of, in the absence of agreement by Majority Stockholders and Purchaser, unless and until the now outstanding construction permit issued by the FCC to Coral for the construction of a television station shall have been extended by the Federal Communications Commission.

(c) Use of Capital and Borrowed Funds. The capital contributions described in Paragraph 3 hereof and the proceeds of

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any loans effected under the provisions of Paragraph 5 hereof shall be used to pay the liabilities of Coral, including amounts owed Counsel by Coral for legal services and related expenses, as shown in Exhibit C for the construction and operation of Television Station WCIX-TV on Channel 6 in South Miami, Florida, and for the purposes attributable to such construction and operation. Payment of Counsel fees and expenses provided for herein shall be made by Coral at the time of Closing hereunder.

7. (a) Officers and Board of Directors. The Board of Directors shall consist of seven (7) members, four of whom shall be elected by the majority stockholders and the Purchaser shall be entitled to elect three Directors through vote of the stock acquired by Purchaser pursuant to this Agreement. C. Terence Clyne shall be selected Executive Director, this position to be held during the period of station construction and for a period



of one year following the commencement of operation of WCIX-TV. It shall be the responsibility of the Executive Director to implement the decision and policies of the Board of Directors in the construction and operation of the station.

(b) A meeting of Stockholders shall be held immediately following the Closing hereunder at which the resignation

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of present directors shall be accepted and at which the following shall be elected directors: Leon McAskill, Leo Robinson, Robert A. Peterson, Cameron Stewart, C. Terence Clyne, Hy Gardner, Harold Straus. Immediately upon the adjournment of the said stockholders meeting there shall be held a Directors meeting for the selection of the Executive Director in accordance with this Agreement. The signatures to this Agreement of Purchaser and the present stockholders, directors and officers of Coral shall constitute such waiver of notice as may be required for the holding of stockholders and directors meetings, and action at such meetings, in accordance with this paragraph. The signatures to this Agreement of the present directors of Coral shall constitute their resignations from such positions effective upon the Closing hereunder and the election of directors, in accordance with the provisions of this paragraph.

8. Pre-emptive Rights. All Stockholders, including Purchaser, shall be on the same footing with respect to pre-emptive rights to acquire any new stock that may be issued by Coral.

9. Sale of Business of Coral. The business of Coral may not be sold, assigned, donated or otherwise disposed of except with the consent of those holding at least 65% of Coral's outstanding stock, such consent being obtained at a stockholders' meeting duly called for that purpose, notified and conducted in accordance with Coral's By-laws and the laws of the State of Florida.

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10. Additional Representations and Warranties by Coral and Majority Stockholders. Coral and Majority Stockholders jointly and severally represent and warrant as follows:

(a) Organization and Standing of Coral Television Corporation. Coral Television Corporation is a corporation duly organized, validly existing and in good standing under the laws of the State of Florida; the copies of its Certificate of Incorporation and all amendments thereto to date and of its By-Laws as amended to date, which appear in the corporation's official records, and which have been certified to Purchaser are complete and correct as of the date of this Agreement.

(b) Capitalization. Coral's entire authorized capital stock consists of 500 shares of common stock of no par value of which 100 shares are issued and presently outstanding and are owned as set forth in the preambles to this Agreement. All such shares have been validly issued, are fully paid and are non-assessable. Except as contemplated by the terms of this Agreement no additional shares of Coral will be authorized or issued from and after the date of this Agreement without the consent of 65% of Coral's stockholders obtained in writing.

(c) Authority to Issue Stock. On the Closing Date, Coral will have full and complete authority to issue additional shares of stock as specified in this Agreement. Upon the Closing hereunder, there will be no outstanding option agreements for the stock of Coral or agreements or other documents which would restrict the sale of the stock of Coral in accordance with the terms of this Agreement.

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(d) Assets and Liabilities of Coral. Purchaser has been provided a copy of a financial statement of Coral, prepared by the accounting firm of Smethurst, Dessaint, and Carter, Miami, Florida, dated as of September 30, 1965 which Coral warrants to be true and correct, and upon which Purchaser has relied, containing a complete listing of all assets now owned by Coral, and a listing of all liabilities and obligations of Coral, properly certified by an independent accountant. The amount owed by the Corporation as of the Closing hereunder shall not exceed eighty five thousand dollars (\$85,000).

(e) Leases and Agreements. Attached hereto as Exhibit A and incorporated by reference herein and made a part hereof is a complete list of all leases, contracts, building permits, agreements and understandings, now in force and effect, to which Coral is a party or which affect the proposed business and operation of Coral.

(f) Financial Statement. The financial statement provided Purchaser, referred to in (d) above, is a true and correct certified financial statement of Coral within thirty

days of this Agreement which has been prepared in accordance with generally accepted accounting principles consistently followed and which represents a complete statement of Coral's financial condition, its assets and liabilities certified by an accountant satisfactory to Purchaser. Coral and Majority Stockholders represent and warrant that they do not know or have reasonable grounds to know of any basis for the assertion against Coral, as at the date of said statement of any liability of any nature or in any amount not fully reflected or reserved against

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on the financial statement provided for herein, or of which Purchaser has not been informed in writing. Coral and Majority Stockholders further represent and warrant that between the date of this Agreement and Closing Date there will be no material change in the financial condition of Coral.

(g) Authorizations from the FCC. Coral and Majority Stockholders represent and warrant that Coral now holds from the FCC a valid construction permit; that there are no proceedings by the Federal Communications Commission or other government authority pending or threatened which would affect the status of Coral's construction permit; and that between the date of this Agreement and Closing Date, they shall do nothing which would adversely affect the status of Coral's construction permit and shall take all steps necessary to preserve the status of the construction permit.

11. Survival of Representations and Warranties. Representations and warranties contained in this Agreement, including those in the preambles, are true, correct and complete on the

Closing Date. The representations and warranties of Coral, Majority Stockholders and Purchaser contained in this Agreement have been made in order to induce entry by all parties into, and performance of, this Agreement and it is understood that Coral, the Majority Stockholders and Purchaser have relied upon said representations and warranties in entering into and performing this Agreement and that Coral, Majority Stockholders' and Purchaser's obligations hereunder are conditioned upon the representations and warranties being true at and as of the Closing Date as though such representa-

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tions and warranties were made at and as of such time. The representations and warranties shall also survive the Closing hereunder.

12. Rules and Regulations of the FCC. This Agreement is entered into subject to applicable rules and regulations of the FCC, and all applicable rules and regulations of the FCC will be complied with by Coral, Majority Stockholders and Purchaser incident to effectuating this Agreement and in all other respects.

13. Provisions with Respect to Stock of Coral. The following shall govern the sale or other disposition of shares of stock in Coral, except a sale pursuant to the pledge arrangements provided for in Paragraph 5 of this Agreement, and all certificates of Coral shall be endorsed with the statement that they are subject to these restrictive agreements.

(a) Transfers of Stock to Members of the Immediate Family. Each of the Stockholders may transfer all or part of his shares in the company by gift or otherwise to or for the benefit

of himself or members of his immediate family. In case of any such transfer, the transferee or transferees shall receive and hold the shares of stock subject to the terms of this Agreement and there shall be no further transfer of such shares except between members of such family, or except in accordance with the terms of this Agreement. For purposes of this Agreement the term "immediate family" shall include only wives, husbands, parents, children (including by adoption), sisters and brothers.

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(b) Sale or Transfer of Stock by Stockholders.

Except as provided in (a) above, no Stockholder shall sell or otherwise transfer any or all of his shares of Coral except as provided hereinafter:

(1) Offer to Other Stockholders. If any of the Stockholders should receive a bona fide offer for the purchase of any or all of his shares of Coral and is desirous of selling upon the terms of the offer, he shall notify each of the other Stockholders of said offer by mailing to each of the other Stockholders a letter, registered mail, return receipt requested, sent to the address indicated by the corporate records of Coral for the Other Stockholders. Said letter shall contain the following:

- (a) The exact number of shares which he proposes to sell;
- (b) the prices per share which has been offered for said shares including the precise terms of payment;



- (c) the date that the offer was made;
- (d) the name and address of the person making the offer;
- (e) a statement that the offer is considered to be bona fide; and
- (f) an offer to sell to Other Stockholders all or any part of the shares described in the letter at exactly the same price per share and upon exactly the same terms as described in the letter.

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Other Stockholders shall have the right, exercisable within thirty days of the receipt of the letter from the selling Stockholder to acquire all or any number of the shares offered by the selling Stockholder at the price and upon the terms indicated. Each Other Stockholder shall have the right thus to acquire that percentage of the shares offered which the number of shares then owned by the selling Stockholder bears to the total number of shares then owned by the Other Stockholders. If one Other Stockholder should fail or refuse to acquire any of the shares offered or should he or it elect to acquire a lesser number of the shares offered than he or it is entitled to under the provisions of this paragraph, the remaining Other Stockholders may acquire all or any number of the shares offered.

(2) Refusal to Purchase All of the Stock Offered. Should Other Stockholders fail or refuse to acquire all



or any of the shares offered by a Stockholder pursuant to the provisions of this paragraph the selling Stockholder may, within sixty days, sell any or all of his shares remaining to the person named and at the price and terms described in the letter of notification. If not so sold within sixty days, such stock may not thereafter be sold without first being offered to the Other Stockholders again pursuant to the provisions of this Agreement.

14. Arbitration. Any controversy or claim arising out of, or relating to this Agreement, or the breach thereof, shall be settled as promptly as possible by arbitration, in the City of

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Miami, Florida, in accordance with the rules then obtaining of the American Arbitration Association, and judgment upon the award may be rendered in any court having jurisdiction thereof. The decision reached by arbitration shall be considered final and no appeal shall be taken therefrom.

15. Benefit. This Agreement shall be binding upon, and inure to the benefit of, the legal representatives, heirs, successors and assigns of the parties hereto, except as otherwise provided herein.

16. Construction. This Agreement is being delivered and is intended to be performed in the State of Florida and shall be construed and enforced in accordance with the laws of that State.

17. Notices. All notices, requests, demands, and other communications hereunder shall be in writing, and shall be deemed

to have been duly given if delivered or mailed, first class postage prepaid, to:

As to Purchaser: C. Terence Clyne  
Clyne Maxon, Inc.  
1301 Avenue of the Americas  
New York 19, New York

As to Majority Stockholders:

Coral Television Corporation  
10 N. E. 3rd Avenue  
Miami, Florida

18. Entire Agreement. All negotiations between the parties are merged in this Agreement and there are no understandings or agreements other than those incorporated herein.

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IN WITNESS WHEREOF, the parties have signed and sealed this Agreement as of the day and year first above written.

Attest:

CORAL TELEVISION CORPORATION

\_\_\_\_\_  
Secretary, Coral Television  
Corporation

By \_\_\_\_\_  
Leon McAskill, President

Witness: \_\_\_\_\_

\_\_\_\_\_  
Leon McAskill

Witness: \_\_\_\_\_

\_\_\_\_\_  
Robert L. Johns

Witness: \_\_\_\_\_

\_\_\_\_\_  
Leo Robinson

Witness: \_\_\_\_\_

\_\_\_\_\_  
Robert A. Peterson

Witness: \_\_\_\_\_

\_\_\_\_\_  
Witness:

\_\_\_\_\_  
Cameron Stewart

\_\_\_\_\_  
Witness:

\_\_\_\_\_  
Arthur Adler

\_\_\_\_\_  
Witness:

\_\_\_\_\_  
W. Keith Phillips

\_\_\_\_\_  
Witness:

\_\_\_\_\_  
Edwin H. Hill, Jr.

\_\_\_\_\_  
Witness:

\_\_\_\_\_  
C. L. Clements, Sr.

\_\_\_\_\_  
Witness:

\_\_\_\_\_  
Norman Swetman

\_\_\_\_\_  
C. Terence Clyne

BRIEF FOR APPELLANT

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20,845

---

L. B. WILSON, INC.,

*Appellant.*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee.*

CORAL TELEVISION CORPORATION,

*Intervenor.*

---

ON APPEAL FROM A MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

---

United States Court of Appeals

for the District of Columbia Circuit

FILED JUN 5 1967

*Martha J. Paulson*  
CLERK

ROBERT A. MARMET  
PETER L. KOFF

1822 Jefferson Place, N. W.  
Washington, D. C. 20036

*Counsel for Appellant*

June 5, 1967



(i)

## QUESTIONS PRESENTED

1. Whether the Commission's findings and conclusions that no substantial and material questions of fact were raised by the petitioners to deny or objector, and that a grant of the Coral application without an evidentiary hearing would be consistent with the public interest, convenience and necessity, are supported by substantial evidence, are based upon an adequate record, and are not arbitrary or capricious.

2. Whether the Commission acted in an arbitrary and capricious manner in finding that the facts alleged by petitioners were not adequate to warrant an evidentiary hearing on the alleged adverse impact that a grant of Coral's application would have on UHF development.

3. Whether the Commission's finding without an evidentiary hearing that there has been no *de facto* transfer of control of Coral is supported by substantial evidence in the record and is not arbitrary or capricious.

4. Whether the Commission failed to give an adequate explanation of the reasons for its action.

5. Whether the Commission abused its discretion in granting a waiver of its Rules to permit Coral to move its transmitter to a short-spaced location.

\*6. Whether the Commission abused its discretion in finding that Coral was financially qualified to construct and operate its station as proposed.

7. Did appellant's Petition to Deny raise a substantial issue as to whether Coral may be relied upon to perform in accordance with its promises to construct and, if so, whether the Commission failed to dispose of that issue contrary to Section 309(d) of the Communications Act of 1934, as amended, and Section 1.591(c) of the Commission's Rules.

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\*Appellant has determined not to advance specifically the sixth stipulated question presented for decision herein.

(ii)

8. After finding that there had been a technical transfer of *de jure* control, but not *de facto* control, of Coral, did the Commission abuse its discretion in permitting Coral to file a FCC short-form 316 to cover the transfer.



(iii)

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 20,845

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L. B. WILSON, INC.,

*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee,*

CORAL TELEVISION CORPORATION,

*Intervenor.*

---

ON APPEAL FROM A MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

---

## BRIEF FOR APPELLANT

### JURISDICTIONAL STATEMENT

This is an appeal from a Memorandum Opinion and Order of the Federal Communications Commission (FCC 67-188, released February 15, 1967) granting the application for modification of construction permit of Coral Television Corporation, permittee of television broadcast station WCIX-TV, Channel 6, South Miami, Florida, to relocate its transmitter site, to change its station location to Miami, Florida, and to make other changes in its authorized facilities. Ju-

jurisdiction of this Court rests in Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b)(6); Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009; and Rule 37 of the Rules of this Court.

### STATEMENT OF THE CASE

The Federal Communications Commission (hereafter Commission) first proposed to assign Channel 6 to the Miami area as part of the general allocations proceeding in Docket No. 11532, in order to give the area its fourth VHF television channel assignment. *Second Report on Deintermixture*, 13 RR 1571, 1583 (1956). The actual assignment was made in 1957, at which time the Commission fully expected that a Channel 6 facility could be located in an area south of Miami that would permit this station to bring needed additional television service to the public from a site which would not derogate from the Commission's minimum mileage separation requirements. *Miami Drop-In Case*, 15 RR 1638a (1957), *reconsideration denied*, 15 RR 1642b (1958).

On April 13, 1958 Coral Television Corporation (hereafter Coral), intervenor herein, filed its initial application (BMPCT-2493) with the Commission seeking a new station to serve South Miami, Florida and to operate on Channel 6. Coral proposed to locate its transmitter on Ragged Keys Tract No. 2 off the coast near Coral Gables, Florida at a site conforming to the Commission's spacing requirements. Following a lengthy and protracted comparative hearing, the Commission approved a joint dismissal agreement between Coral and the one remaining competing applicant. This agreement enabled the Commission to award a construction permit to Coral, an essential part of the Commission's rationale being that termination of the proceedings as contemplated by the two applicants "will expedite the establishment of a new television broadcast service to the area of Miami, Florida." *Publix Television Corp.*, 2 RR 2d 483, 489 (1964).

In the period which followed the grant of its construction permit in April of 1964, however, Coral did not begin construction of its station at the transmitter site authorized by the Commission. Instead, Coral applied for authority to change the location of its transmitter to Ragged Keys Tract No. 4 (BMPCT-6004, filed August 24, 1964, granted October 26, 1964), and then to Ragged Keys Tract No. 3 (BMPCT-6178, filed October 27, 1965, granted December 17, 1965). Nor was construction of Coral's station begun at either of these sites. In the meantime, Coral had requested two extensions of the completion date for construction of its station (BMPCT-6086 and BMPCT-6176). On January 2, 1966 Coral applied for permission to change its studio location from South Miami to Miami, Florida (BMPCT-6242, granted March 24, 1966).

Several months previously, on October 14, 1965, a Stock Purchase Agreement was executed between Coral and C. Terence Clyne, who at that time had no interest in Coral, which, *inter alia*: (1) gave Mr. Clyne 200 shares of stock (40%); (2) made Mr. Clyne Executive Director; (3) gave Mr. Clyne the right to select three of the seven members of the Board of Directors; and (4) provided that the station could not be sold without an affirmative vote of 65% of the Coral stock. On November 18, 1965 Mr. Clyne was also made Chairman of the Coral Board of Directors, and in March of 1966 he transferred 25 shares (5%) of his stock to Hy Gardner and family. Mr. Clyne also obtained a \$600,000 bank loan for Coral, which was a condition precedent to the Stock Purchase agreement he had entered into. (R. 466).

The application of Coral (BMPCT-6256) which is the subject of the instant appeal was filed with the Commission on March 15, 1966, wherein Coral requested a modification of its outstanding construction permit to change its transmitter location to the Florida mainland in an area south of Miami near Homestead, to change its station location to Miami, Florida, to change the location of its main studio within Miami, and to make various other changes in its authorized facilities. (R. 1-53).



In this application Coral proposed to move its transmitter some 17 miles to the west of its then authorized site to an area on the Florida mainland that would derogate the minimum co-channel mileage separation requirements with both the present location (by 4.7 miles) and the proposed new site (by 6.1 miles) of television broadcast station WDBO-TV, Channel 6, Orlando, Florida. For this reason Coral filed contemporaneously with its application a Petition for Waiver of the Commission's spacing requirements. (R. 54-57). In addition, since Coral would be able to place a city-grade signal over only 99.89% of the land area of Miami from its proposed new transmitter location, Coral requested a waiver of the Commission's requirements that it place a city-grade signal over its entire proposed principal city of service. (R. 54-57).

On April 29, 1966 petitions to deny the Coral application were filed by Storer Broadcasting Company, permittee of television broadcast station WGBS-TV, Channel 23, Miami, Florida (R. 483-96); by Scripps-Howard Broadcasting Company, licensee of television broadcast station WPTV, Channel 5, West Palm Beach, Florida (R. 60-66); and by appellant L. B. Wilson, Inc., licensee of television broadcast station WLBW-TV, Channel 10, Miami, Florida (R. 67-89). In addition, informal objections to this application were filed on May 2, 1966 by The Association of Maximum Service Telecasters, Inc. (R. 103-158). An opposition to each of these petitions to deny and to the informal objections was filed by Coral (R. 161-69, 170-74, 175-212, and 214-225), and responsive replies were submitted by the objectors (R. 232-34, 235-44, 246-52, and 253-74).

On June 15, 1966 Coral submitted an amendment to its pending application to up-date its financial information and to make minor engineering corrections (R. 275-95), which amendment led appellant to file a supplement to its petition to deny on June 29, 1966 (R. 304-13). This supplement was also opposed by Coral (R. 336-57), and a reply was filed by appellant (R. 361-69). Scripps-Howard withdrew its petition to deny on October 18, 1966, and on December

23, 1966 Coral submitted a further amendment to its application to supplement its financial showing (R. 381-413), in response to the Commission's letter of December 14, 1966 (R. 379-80). On January 6, 1967 appellant filed comments in response to Coral's amendment. (R. 417-22).

On February 8, 1967, the Commission granted without hearing, by a vote of 4 to 3, Coral's application for modification of construction permit, concluding that the petitions to deny and informal objections had not raised any substantial or material questions of fact, that grant of the application would be consistent with the public interest, and that Coral was qualified to construct and operate as proposed. (R. 459-69). In addition, since the Commission concluded that a transfer of *de jure* or technical control of Coral had occurred without prior Commission consent, Coral was ordered to file a FCC short-form 316 to cover this transfer. (R. 467-68). The Commission's action was taken by a vote of 4 to 3, but the Commission's Memorandum Opinion and Order was adopted by only three of the seven Commissioners, since Commissioner Cox chose to concur "in the result" only. (R. 459).

Notice of appeal from the Commission's Memorandum Opinion and Order granting the Coral application was filed by appellant with this Court on March 17, 1967. On April 21, 1967 appellant petitioned this Court to stay, *pendente lite*, the effectiveness of the Commission's grant. Oppositions to this petition were filed by the Commission, appellee herein, and by Coral. By order released May 25, 1967, appellant's Petition for Stay Pendente Lite was denied.

## STATUTE INVOLVED

Listed below are the relevant portions of Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309:

SEC. 309. (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 applies, whether the public interest, convenience and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Except as provided in subsection (c) of this section, no such application—

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services \* \* \* shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

\* \* \*

(d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing; or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be

reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party

to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

\* \* \*

#### STATEMENT OF POINTS

In light of the substantial and material questions of fact raised in the pre-grant pleadings, the Commission acted contrary to Section 309 of the Communications Act and abused its discretion in granting the Coral application without hearing, for the following reasons:

- (1) A substantial and material question of fact was raised concerning the adverse impact on UHF development in Miami that would be caused by grant of the Coral application, and the Commission failed to give an adequate explanation of reasons for not holding a hearing on this issue.
- (2) Since important public policy considerations were raised to demonstrate why waiver of the Commission's minimum mileage separation requirements would not be in the public interest, the Commission erred in finding that grant of the Coral application without hearing would serve the public interest, and the Commission failed to give an adequate explanation of its reasons for this action.
- (3) The Commission's finding without an evidentiary hearing that there has been no *de facto* transfer of

control of Coral, but a transfer of *de jure* control, is erroneous, is not supported by substantial evidence in the record, and is not adequately explained, and the Commission abused its discretion in permitting Coral to file a FCC short-form 316 to cover the transfer.

- (4) The Commission acted contrary to Section 309(d) of the Communications Act and Section 1.591(c) of its own rules in failing to dispose of the substantial issue raised by appellant's petition to deny concerning Coral's consistent failure to construct its station as promised.
- (5) The Commission erred in failing to designate the Coral application for hearing to determine whether Coral had properly ascertained the programming needs and interests of its proposed new service area.

### SUMMARY OF ARGUMENT

The application of Coral Television Corporation for modification of its construction permit for authority to locate its transmitter at a site that would derogate the Commission's minimum co-channel mileage separation requirements presented significant public interest questions, raised by objectors to grant of the application, which required the Commission to designate the application for a full evidentiary hearing, under the mandate of Section 309 of the Communications Act. The Commission erred in failing to hold a hearing, and in concluding that grant of the Coral application would be consistent with the public interest. In addition, the Commission's explanation of the reasons for its action was unclear and inadequate in major respects, the Commission failed to resolve the inconsistencies in the rationale for its action, and the Commission failed to explain the differing treatment it gave the Coral application from other similar applications. These failures and inadequacies in the Commission's opinion are particularly significant and fatal

to the validity of the Commission's action, since the Coral application was granted in a Memorandum Opinion and Order not adopted by a majority of the seven-member Commission.

Since the record shows that a substantial and material question of fact was raised concerning the adverse impact on UHF development in Miami that would be caused by grant of the Coral application, the Commission erred in not holding a hearing on this issue and acted contrary to the specific holding of this Court in *Louisiana Television Broadcasting Corp. v. FCC*, 121 U.S. App. D.C. 24, 341 F.2d 808, (1965). Nor did the Commission in attempting to explain the reasons for its arbitrary refusal to conduct a hearing properly consider the factual allegations raised in support of a hearing on this issue, and it failed to explain its decision in light of other Commission cases where similar applications were set for hearing on the "UHF impact" issue.

Furthermore, the Commission erred and abused its discretion in arbitrarily refusing to hold a hearing on Coral's request to move to a transmitter location that would derogate the Commission's minimum mileage separation requirements, without justifying why grant without a hearing would not violate this Court's mandate in *Louisiana Television Broadcasting Corp. v. FCC*, *supra*. In addition, the Commission did not explain the reasons for the change from its previous determination that a Channel 6 facility could be utilized at a site that did not violate its separation requirements, and the Commission failed to explain its variance in this case from other cases where similar applications were designated for hearing on the "short-spacing" issue.

Appellant further contends that the Commission, without adequate explanation, erroneously determined that C. Terence Clyne's rise to the dominant position within the corporate structure of Coral, and his crucial role in obtaining for Coral adequate funds to construct the Channel 6 facility, did not result in a transfer of actual control of Coral to Mr. Clyne, a transfer whose prior approval was not requested by



Coral. The Commission's finding that a mere technical transfer of control had occurred was erroneous. For these reasons, the Commission arbitrarily found that grant of the Coral application without hearing would serve the public interest.

Two additional points are advanced by appellant to support its contention that the Commission erred in granting the Coral application without hearing. First, the Commission's decision did not dispose of the substantial issue raised in appellant's petition to deny concerning Coral's consistent failure to construct its station as promised. Secondly, the Commission erred in failing to designate the Coral application for hearing to determine the efforts made by Coral to ascertain the programming needs and interests of its proposed new service area. In so refusing to hold a hearing on this issue the Commission acted contrary to this Court's decision in *Louisiana Television Broadcasting Corp. v. FCC* and in previous cases decided by this Court.

## ARGUMENT

### I.

#### Preliminary Statement

In granting the Coral application without hearing, the Commission found that the petitioners to deny and informal objector had not raised any substantial and material questions of fact, and that grant of the Coral application would be consistent with the public interest (R. 467). It is appellant's position, however, that the pleadings before the Commission raised a number of substantial and material questions of fact that required the Commission to designate the Coral application for hearing, and that the Commission further erred in finding that grant of the Coral application without an evidentiary hearing would be consistent with the public interest.

As this Court has pointed out on a number of recent occasions,<sup>1</sup> the Congress has established a comprehensive proce-

<sup>1</sup>See, e.g., *Spanish International Broadcasting Co. v. FCC*, D.C. Cir. No. 20,326, Slip Op. pp. 11-12 (1967); *Folkways Broadcasting Co. v. FCC*, D.C. Cir. No. 19,971 (1967).

dural scheme in Section 309 of the Communications Act<sup>2</sup> which governs the manner in which contested applications for licensing authority, such as the application of Coral, must be handled by the Commission. Should a party in interest file a timely petition to deny containing specific allegations of fact to show that grant of an application would be prima facie inconsistent with the public interest, convenience and necessity, and should these allegations of fact raise a "substantial and material question of fact," then Section 309(e) requires that the Commission designate the contested application for hearing. This statute also requires that the application be designated for hearing should the Commission "for any reason" be unable to make the affirmative finding that grant of the application would be consistent with the public interest.

In the petitions to deny filed by appellant and by Storer, and in the informal objections filed by the Association of Maximum Service Telecasters, Inc. (hereafter AMST), substantial factual allegations were set forth to show that grant of the Coral application would not be consistent with the public interest. These factual assertions raised substantial and material questions concerning the adverse impact on UHF television broadcasting that would be caused by grant of the Coral application, the sufficiency of the justification set forth by Coral to support its request to move to a short-spaced transmitter site, the ability and willingness of Coral to construct in accordance with its promises, the consummation of a transfer of control of Coral without prior Commission approval, the financial qualifications of Coral to construct and operate its proposed station, and the steps taken by Coral to ascertain the programming needs and interests of the new areas it proposed to serve.

Appellant believes that sufficient factual allegations were advanced in support of each of these questions that the Commission was compelled, under Section 309(e), to design-

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<sup>2</sup>Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309, hereinafter cited as "Section 309."

nate the Coral application for a full evidentiary hearing. In fact, three of the public interest questions raised by the petitioners and the objector<sup>3</sup> were precisely the type of public interest issues

“which, according to Commission practice and this Court’s cases, should not ordinarily be decided summarily. When so many significant policy issues exist, it is plainly improper to grant an application without the full record of facts and adversary views a hearing would provide.”

*Louisiana Television Broadcasting Corp. v. FCC*, 121 U.S. App. D.C. 24, 26, 347 F.2d 808 (1965) (Commission reversed for failing to conduct an evidentiary hearing on five public interest issues raised by opponents to grant of an application for modification of construction permit).

The other three public interest assertions<sup>4</sup> were so sharply and directly controverted by Coral that appellant contends that they, too, should have been exposed to the give-and-take of a full evidentiary hearing, in line with this Court’s decision in *Southwestern Operating Co. v. FCC*, 122 U.S. App. D.C. 137, 140-41, 351 F.2d 834 (1965) (Commission reversed for granting without hearing an application for construction permit in the face of serious public interest questions), and its decision in *Louisiana Television Broadcasting Corp.*, *supra*.

Appellant further urges that the Commission failed in major respects to give a full, clear and adequate explanation of the reasons for its decision and the reasons why it treated the Coral application differently from similar applications. Accordingly, this case must be reversed and remanded to the Commission. See, e.g., *Miners Broadcasting Service, Inc. v. FCC*, 121 U.S. App. D.C. 222, 349 F.2d 199 (1965); *Melody*

<sup>3</sup>The questions dealing with UHF impact, waiver of the Commission’s spacing rules, and efforts to determine the programming needs of the proposed new service area.

<sup>4</sup>The questions concerning transfer of control, financial qualifications, and reliability of Coral to construct as promised.

*Music, Inc. v. FCC*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965).

The absence of a clear and well-reasoned opinion below is especially critical in the instant case, where *less than a majority of the Commissioners voted in favor of the Commission's decision*. (R. 459). The Coral application was granted by a vote of 4 to 3, with Commissioners Bartley, Lee and Johnson dissenting. Commissioner Cox chose to vote with the majority, but concurred "in the result" only and did not join in the decision. (R. 459). Commissioner Cox did not issue a statement explaining the reasons for his refusal to join in the Commission decision, and no statement was issued by the three dissenting Commissioners.

Appellant contends that the Commission was bound to give a much more thorough explanation of the reasons for its action than it did in the present case, since the Commissioners themselves had so many doubts about the wisdom of the course of action they were adopting. When viewed in the context of the sharply disputed factual contentions and policy arguments that marked the contest over Coral's application, appellant believes that the failure of the Commission fully to explain the votes of its members is fatal to its decision.

## II.

**A Substantial and Material Question of Fact Was Raised Concerning the Adverse Impact on UHF Development in Miami That Would Be Caused by Grant of the Coral Application, and the Commission Failed To Give an Adequate Explanation of Its Reason for Not Holding a Hearing on This Issue**

**A. Specific Factual Allegations Were Raised in the Record Such as To Give Rise to a Substantial and Material Question of Fact**

The major factual contentions in the record below on the "UHF impact issue" were contained in the Petition to Deny filed by Storer Broadcasting Company, the permittee of UHF television broadcast station WGBS-TV, Channel 23, Miami, Florida. (R. 483-96). There Storer outlined the specific facts concerning its own prior unsuccessful attempt, between December of 1954 and April of 1957, to compete effectively in the Miami market with the then two Miami VHF television stations, during which period of time Storer suffered operating losses of \$432,978.52. (R. 485).

It was based upon this experience and Storer's study of the present conditions in the Miami television market, where three VHF stations were then on the air and a fourth VHF station (Coral) was authorized, that Storer concluded that a grant of Coral's construction permit would in all likelihood substantially impair UHF development in South Florida for the foreseeable future. (R. 484-89).

Storer specifically pointed out that the present conditions in the Miami television market would make it difficult successfully to develop UHF television broadcasting, because of the multitude of competitive television signals available in the area, and because of the present conditions of program availability<sup>5</sup> and of UHF set saturation. (R. 487-89). Since the

<sup>5</sup>Each of the three operating VHF stations was affiliated with a major national television network, the prime source of television programming. For this reason, Commission decisions repeatedly have

outlook for UHF development was so marginal, Storer specifically advised the Commission that its own plans for the reactivation of Channel 23 would be canceled should the Commission grant the application of Coral to move its transmitter to the mainland, to double its antenna height, and to seek a Miami station location. (R. 487-88).

Storer's conclusions were based upon the substantial intensification of Coral's signal strength throughout its primary service area that would result from grant of the Coral application, allowing this station for the first time meaningfully to serve all of the densely populated areas in and around Miami. (R. 488). The sworn engineering statement attached to Storer's petition showed that Coral's move would add 255,797 persons to its principal city service area (a 53.3% increase), and an additional 127,705 persons to its Grade A service area (an increase of 14.8%). (R. 488, 493). These substantial changes, Storer concluded, "would make impracticable the resumption or continuation of WGBS-TV's UHF operations at this time." (R. 488).

Appellant contends that the above specific factual allegations of Storer, wherein Storer referred to its own prior unsuccessful attempt to compete in the Miami television market, and wherein Storer outlined why present market conditions in Miami were so marginal for successful UHF development, raised a substantial and material question of fact: namely, whether the move of Coral's transmitter to the mainland, the doubling of Coral's antenna height, the substantial intensification of Coral's signal strength within its own primary city service area, and the change of Coral from a South Miami to a Miami station location would imperil the ability of UHF stations in Miami to compete successfully. Accordingly, appellant urges that the Commission

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pointed out the substantial handicaps and financial risks that face a new UHF station attempting to come into a television market already served by three network-affiliated VHF stations and one independent VHF station. See, e.g., *Channel Assignment in Bloomington-Indianapolis*, 5 RR 2d 1744 (1965).

erred in not designating the Coral application for hearing on this issue. *Louisiana Television Broadcasting Corp. v. FCC*, *supra*.

**B. The Commission's Explanation of Why No Hearing  
Was Necessary on the UHF Impact Question  
Is Completely Inadequate**

Even assuming, *arguendo*, the propriety of the Commission's finding that no substantial and material question of fact was raised on the UHF impact issue, appellant strongly believes that the Commission failed to give an adequate explanation of the reasons for its refusal to hold a hearing on this question.

**1. The Commission's Opinion Failed To Consider the  
Factual Allegations Raised by Storer**

First of all, the Commission's Memorandum Opinion and Order completely ignored the major factual allegations of Storer, that the substantial increase in the number of people within Coral's principal city service area, and the substantial intensification of its signal therein, would have a harmful impact on UHF development. The Commission has not dealt with this fact. Instead, its opinion attempts to side-step this issue with a reference to the alleged *de minimis* increase in the number of persons that would be within Coral's Grade B service area. (R. 462-63). Appellant contends, however, that the Commission has missed the point entirely.

**2. The Commission Failed To Explain Its Decision in Light  
of Similar Commission Cases**

Secondly, appellant believes that the Commission failed adequately to explain, in light of its previous treatment of other cases which raised the "UHF impact issue,"<sup>6</sup> the rea-

<sup>6</sup> Appellant believes that extensive citation of Commission decisions treating the UHF impact question is not warranted, since this Court has recently agreed that Commission decisions have expressed

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sons why Storer's allegations of fact were not sufficiently specific to warrant designation of the Coral application for hearing. The Commission cited in support of its conclusion on this point only its recent decision in *Atlantic Telecasting Corp.*, 3 F.C.C.2d 442, 7 R.R.2d 297 (1966). (R. 463).<sup>7</sup> In that case the Commission held that no hearing was required on the application of Wilmington, N. C. television station to move its transmitter site to a new location, since the objector did not allege sufficient facts to show that the improvement in strength of the signal that this station would put over Fayetteville, N. C., a community located well beyond the station's primary service area, would imperil the ability of the applicant for a new UHF television station in Fayetteville to compete successfully. This Court affirmed the Commission's findings and reasons therefor. *Jackson F. Lee v. FCC*, \_\_ U.S. App. D.C. \_\_, 374 F.2d 259 (1967).

An entirely different factual situation, however, is presented by the instant case. Here the applicant's proposed increase in signal strength is not at the outer edges of its service contours and well beyond its principal city of service, as it was in the *Atlantic Telecasting Corp.* case, *supra*. Here the relevant increase in signal strength will take place within the heart of both the television station's primary service area and the area in which UHF television conceivably could develop. It is for this reason that the grant of Coral's application will have tangible adverse results on prospective UHF development in Miami.

The *Atlantic* case is also completely different from the present case for another very important reason. In granting

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its "deep concern . . . for protection of UHF stations. . . ." *Jackson F. Lee v. FCC*, \_\_ U.S. App. D.C. \_\_, 374 F.2d 259, 260 (1967). The relevant inquiry here, rather, is whether the Commission has enunciated a consistent and clear standard for judging requests for a "UHF impact" issue. See *Melody Music, Inc. v. FCC*, *supra*.

<sup>7</sup>It should also be noted that footnote 7 of the Commission's opinion is merely a "Cf." citation to its decision in *WLCY-TV, Inc.*, 6 F.C.C. 2d 213, 9 RR 2d 142 (1967), but without any elaboration or explanation for this citation. (R. 463).

the application in *Atlantic Telecasting Corp.*, *supra*, the Commission specifically pointed out that no waiver of the Commission's rules would be necessary. *Atlantic Telecasting Corp.*, *supra*, 3 F.C.C.2d at 444, 7 R.R.2d at 300. Here, however, the Commission has had to waive both its minimum mileage separation rule<sup>8</sup> and its rule requiring an applicant to place a city grade signal over the entire land area of the principal community to be served.<sup>9</sup> (R. 468).

It should also be made clear that Storer has asserted specific factual allegations in support of its petition to deny to a degree far in excess, in terms of both quantity and specificity, of the factual assertions submitted by the objector in the *Atlantic Telecasting Corp.* case. It must be emphasized that Storer's allegations were in part based upon its own two and one-half years of experience in attempting to operate a UHF station, and its statements as to the harmful impact on UHF development were not based upon idle speculation. It should also be emphasized again that these assertions were ignored by the Commission in favor of a stilted attempt to bring the present case within the factual confines of the Commission's decision in *Atlantic Telecasting Corp.*, *supra*. (R. 462-63).

Nor did the Commission see fit to explain why, when a mere two months earlier it ordered an evidentiary hearing on the UHF impact issue in a proceeding involving a similar request of a television station to move to a short-spaced transmitter location,<sup>10</sup> the factual assertions contained in

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<sup>8</sup>Section 73.610(b) of the Commission's Rules, 47 C.F.R. § 73.610(b).

<sup>9</sup>Section 73.685(a) of the Commission's Rules, 47 C.F.R. § 73.685(a).

<sup>10</sup>*WLCY-TV, Inc.*, 6 F.C.C. 2d 550, 9 RR 2d 142 (1966). There are many similarities between that case and the present one, both of which involve efforts by Florida television stations to resolve their continued attempts to obtain a transmitter location free of aeronautical problems.

the present record were not also adequate to warrant a hearing on the UHF question.

What makes the Commission's failure to explain the present case in light of the *WLCY-TV, Inc.* case so troublesome is that the factual allegations which were apparently held to be adequate to warrant a UHF impact issue in the *WLCY-TV, Inc.* case were no more specific than the factual allegations advanced by Storer in the present case. For this reason appellant believes that it was incumbent on the Commission fully to explain the reasons why it has used different standards to weigh the same factual allegations. See *Melody Music, Inc., supra*.

In sum, appellant believes that recent Commission decisions have generated a substantial amount of confusion and uncertainty as to what standards the Commission will use to judge requests for a UHF impact issue. Appellant further contends that this absence of a clear and even-handed approach by the Commission warrants this Court reversing and remanding this case to the Commission. *Miners Broadcasting Service, Inc. v. FCC, supra*; *Melody Music, Inc. v. FCC, supra*.

### III

**The Commission Abused Its Discretion in Granting a Waiver of Its Rules, Without a Hearing, To Permit Coral To Move to a Short-Spaced Transmitter Location, and the Commission Failed To Give an Adequate Explanation of the Reasons for Its Action**

#### **A. The Commission Erred in Waiving Its Rules Without Holding a Full Evidentiary Hearing**

The petitions to deny filed by both appellant (R. 69) and by Storer (R. 489-91), as well as the informal objections filed by AMST (R. 121-31), took issue with the merits of Coral's petition for Waiver<sup>11</sup> of Section 73.610(b) of the

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<sup>11</sup>R. 54-57.

Commission's Rules, wherein Coral requested that the Commission's separation requirements be waived to permit its move to a transmitter site approximately 5 miles short of the minimum distance specified in Section 73.610(b)<sup>12</sup>. Because these pre-grant pleadings raised significant policy considerations why grant of the requested waiver would not be in the public interest, appellant contends that the Commission erred and abused its discretion in finding that the public interest would be served by a waiver of its rules and grant of the application without hearing, and that the Commission ignored the specific instructions of this Court in *Louisiana Television Broadcasting Corp., supra*.

The informal objections filed by the Association of Maximum Service Telecasters, Inc. (AMST) recited at great length the background relating to the Commission's decision, twice adopted after exhaustive consideration, that a fourth VHF channel, Channel 6, could be assigned to Miami and could be utilized from a transmitter location that would not derogate minimum mileage separations (R. 121-26).<sup>13</sup> AMST specifically cited the Commission's previous determination that any competitive disadvantage that a Channel 6 station might have to face because of its location south of Miami at full separation requirements "would be of short duration and would not inhibit the opportunities for a Channel 6 station to compete on a comparable basis in the area." *Miami Drop-In Case, supra* n. 13, 15 RR at 1642. (R. 124).

Furthermore, AMST took particular issue with the undocumented assertions in Coral's Petition for Waiver (R. 35-36) that it has been unable to locate any site which would meet minimum mileage separation requirements, which would not present aeronautical problems, and which would allow Coral

<sup>12</sup>This rule requires that Coral's transmitter be located at least 220 miles from the transmitter site of the nearest co-channel television station.

<sup>13</sup>See *Miami Drop-In Case*, 15 RR 1638a, 1640-42 (1957), *reconsideration denied*, 15 RR 1642b-42c (1958).

to provide service competitive with the other Miami stations. (R. 126-29). Both AMST (R. 129-31) and Storer (R. 489-90) further pointed out that Coral's waiver request was not justified in light of the potential adverse impact this would have on UHF development.

In addition, each of the pre-grant objections<sup>14</sup> took issue with the major premise in Coral's Petition for Waiver, that the Commission in allocating Channel 6 to Miami in 1958 indicated its willingness at a later date to consider a waiver of its spacing rules in order that Miami may have a fourth competitive VHF television service. What Coral failed to appreciate, it was pointed out, was that Channel 6 was assigned to Miami at a time when UHF development was at a low ebb, and that the present bright hopes for UHF, kindled by the so-called "all-channel receiver law"<sup>15</sup> and the Commission's renewed efforts to stimulate UHF development, made Coral's rationale obsolete.

Appellant fully believes that the important policy issues raised in the pre-grant pleadings regarding waiver of minimum co-channel mileage separation requirements, and the effect of this waiver on UHF development, were exactly the type of public interest issues which this Court has specifically stated "should not ordinarily be decided summarily." *Louisiana Television Broadcasting Corp. v. FCC, supra.*

**B. The Commission Did Not Adequately Justify Its Refusal To Hold a Hearing To Determine Whether the Public Interest Was Served by Waiving Its Short-Spacing Rules**

In any event, the Commission should have adequately and fully explained the reasons for its refusal to designate the Coral application for hearing on the "short-spacing" issue. The Commission's opinion in this regard is particularly weak.

<sup>14</sup> L. B. Wilson petition to deny, p. 3 (R. 69); Storer petition to deny, pp. 7-8 (R. 489-90); AMST objections, pp. 26-28 (R. 128-30).

<sup>15</sup> Section 330 of the Communications Act of 1934, as amended, 76 Stat. 151 (1962), 47 U.S.C. § 330.

For one, no attempt has been made to explain why its treatment of this issue is properly an exception to the general rule announced by this Court in the *Louisiana Television Broadcasting Corp.* case, *supra*, where it was pointed out this issue should ordinarily not be decided until after a hearing. Nor did the Commission attempt to explain why it ordered a hearing on this same issue in the *WLCY-TV* case, but granted the Coral waiver request and application without hearing.<sup>16</sup>

Nor did the Commission's decision attempt to explain what changed circumstances have taken place which justify reversal of the Commission's earlier determination, made on two separate occasions after exhaustive consideration, that a short-spaced Channel 6 facility would not be necessary. In fact, the opinion below does not even allude to its previous determinations on this point, and instead completely side-steps this crucial issue.<sup>17</sup>

Perhaps the most glaring weakness in the Commission's explanation of its decision on this question is the Commission's complete failure to explain its own diametrically opposite findings that, on the one hand, the stronger signal Coral would provide from its new site<sup>18</sup> justifies a waiver of the spacing rules (R. 461-62), and on the other hand, that this improvement in signal strength would not be of serious enough magnitude to warrant a hearing on the "UHF impact" issue (R. 462-63). Appellant believes that it was

<sup>16</sup>It should also be noted that the "short-spacing" issue and the "UHF impact" issue were among the issues designated for hearing in *Blackhawk Broadcasting Co.*, 4 F.C.C. 2d 282, 8 RR 2d 238 (1966), a decision also unexplained in the opinion below. See also *St. Anthony Television Corp.*, FCC 67-598 (May 24, 1967).

<sup>17</sup>This failure to explain the Commission's change in attitude, in and of itself, requires reversal by this Court. See *Louisiana Television Broadcasting Corp.*, *supra*, 121 U.S. App. D.C. at 127, n. 7.

<sup>18</sup>The Commission relied on the fact that Coral would add 256,000 persons to its principal city contour and 127,000 persons to its Grade A contour. (R. 461).

incumbent on the Commission to explain why these findings are not in fact inconsistent, diametrically opposed, and logically incompatible.

#### IV.

##### **The Commission Erred in Finding That Actual Control of Coral Had Not Been Transferred Without Prior Commission Consent, and the Commission Failed To Give an Adequate Explanation of Its Finding That a Mere Technical Transfer of Control Had Occurred**

The petition to deny filed by appellant recited with minute detail the changes in stock ownership, corporate organization, and financing that had taken place with respect to Coral Television Corporation, changes which strongly indicated that *actual control* of this corporation had passed from the original shareholders as a group to the current single dominant stockholder, C. Terence Clyne, without prior Commission consent. (R. 70-79). These allegations were vehemently opposed by Coral in its opposition to appellant's petition to deny (R. 180-88), and appellant submitted further arguments in response to the statements of Coral (R. 237-43).

The Commission concluded that an unauthorized technical or *de jure* transfer of control had occurred, but that Coral had not attempted to conceal or misrepresent the facts with respect to control of the corporation. (R. 467). Accordingly, the Commission ordered Coral to file an FCC short-form 316 application for consent to transfer of control. (R. 467-68). The Commission further concluded, however, that no transfer of *de facto* control of the corporation had taken place. (R. 464-67). These conclusions are erroneous, not based upon substantial evidence in the record, and not adequately explained in the Commission's decision.

First, the Commission completely ignored the *cumulative effect* that Mr. Clyne's varied and substantial participation in the affairs of Coral has had toward putting him in a position to exercise *actual control* over that corporation. In



finding that Mr. Clyne was not in a position to exercise actual control over Coral, the Commission treated each of the below-enumerated indicia of control possessed by Mr. Clyne as a separate matter and did not make any finding that the *cumulative effect* of his possession of these prerogatives and powers would not be sufficient to allow him to exercise actual control over Coral:

- (1) Mr. Clyne obtained voting control of over 40% of the stock held by the original stockholders, and then transferred 5% of this stock to Hy Gardner, leaving himself with by far the largest voting power (35%) of any single shareholder, as opposed to the 6% held by the next largest shareholder.
- (2) Not only was Mr. Clyne required to obtain a \$600,000 bank loan as a condition precedent to his stock purchase, but his personal collateral was put up to guarantee this loan.
- (3) Mr. Clyne was given the power to appoint three new members of the Coral Board of Directors and exercised his right to become the Executive Director.
- (4) Mr. Clyne acquired pre-emptive rights to the corporation's stock, acquired a right of first refusal to all Coral stock, and was elected chairman of the Coral Board of Directors.

As one of the reasons to support its conclusion that actual control of Coral did not rest in Mr. Clyne, the Commission found that he could not block sale of the station without the vote of stock owned by someone else.<sup>19</sup> (R. 466-67). This finding by itself does not support the Commission's conclusion, however, since this conclusion could logically follow *only* if the Commission made an additional finding that Mr. Clyne is not in privity of interest with any

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<sup>19</sup> Under the terms of the stock purchase agreement executed on October 14, 1965, sale of the Coral station could be "blocked" by a vote of only 36% of the Coral stock. (R. 466).

of the other stockholders of Coral.<sup>20</sup> Appellant urges that the Commission erred and abused its discretion in not holding a hearing to obtain evidence on this disputed question. In addition, appellant submits that the Commission based its conclusion on this issue in part upon facts not in the record, since this conclusion would logically follow only if the Commission further found that Mr. Clyne has no privity of interest with other Coral stockholders. No such finding was made.

The Commission's explanation of why Mr. Clyne would not be in a position to control Coral through control of its finances<sup>21</sup> is wholly inadequate and completely misplaced. Citing its holding in *Radio Associates, Inc.*, 21 RR 368 (1962), wherein the Commission found that actual control of a corporation did rest in the one individual in control of the corporate finances, the Commission stated that the present situation is inapposite because Mr. Clyne merely obtained a \$600,000 loan for the corporation, but did not furnish the money himself.

This explanation falls by its own weight, since the Commission completely ignored that *Mr. Clyne's own personal collateral was put up to guarantee the corporate loan*. In the event of corporate default Mr. Clyne's own assets would be the very source of Coral's financing, just as if he had put up the money in the first instance. Yet the Commission did not even consider this point.

Furthermore, the Commission's decision failed to distinguish the present factual situation from other Commission

<sup>20</sup> Since Mr. Clyne transferred 5% of his original 40% stock interest to Mr. Gardner, and since Mr. Clyne appointed Mr. Gardner to the Coral Board of Directors (R. 466), it appears likely that privity of interest does in fact exist between these two stockholders.

<sup>21</sup> This Court has frequently recognized that control of a corporation is often transferred upon the assumption of control over the finances. See, e.g., *WLOX Broadcasting Co. v. FCC*, 104 U.S. App. D.C. 194, 260 F.2d 712 (1958); *Heitmeyer v. FCC*, 68 U.S. App. D.C. 180, 95 F.2d 91 (1937).

decisions cited by appellant in support of its contentions that actual control of Coral had passed to Mr. Clyne.<sup>22</sup> Appellant believes that it was incumbent upon the Commission to explain its findings on the transfer of control issue with greater care and sensitivity to the legitimate arguments advanced by appellant in its petition to deny.

One additional matter should be noted at this point. Coral was granted a construction permit in 1964 after a lengthy comparative hearing at the Commission.<sup>23</sup> As noted in the Commission's decision below (R. 464-66), Mr. Clyne was not among the group of original stockholders. The record of this case clearly shows that Mr. Clyne was allowed to purchase a substantial stock interest in Coral, and was given numerous powers, prerogatives, and the obligation to obtain a bank loan for Coral, in order that Coral might obtain the funds it needed to construct and operate its station. (R. 427, 466). This being the case, appellant asserts that the Commission was bound to expose Coral's financing and management changes to the same type of evidentiary hearing process that Coral went through in order to obtain its construction permit in the first instance. This the Commission erroneously failed to do.

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<sup>22</sup>*Elyria-Lorain Broadcasting Co.*, 6 RR 2d 191 (1965); *WHDH, Inc.*, 3 RR 2d 579 (1964); *WWIZ, Inc.*, 2 RR 2d 169 (1964).

<sup>23</sup>*Publix Television Corp.*, 2 RR 2d 483 (1964).

## V.

**The Commission Acted Contrary to Section 309(d)(2) of the Communications Act in Not Disposing of a Substantial Issue Raised by Appellant Concerning Coral's Consistent Failure To Construct as Promised**

The statutory mandate of Section 309(d)(2) of the Communications Act is clear: if the Commission concludes that no "substantial and material questions of fact" have been raised by a petition to deny, and if the Commission concludes that grant of the application would serve the public interest, then the Commission is compelled "to issue a concise statement . . ., *which statement shall dispose of all substantial issues raised by the petition.*" (Emphasis added). The Commission's opinion below, however, completely ignored and failed to dispose of one of the two major issues raised in appellant's petition to deny.

Appellant, in filing its petition to deny, specifically pointed out that it was concentrating on two issues: (1) the apparent unauthorized transfer of control of Coral; and (2) "Coral's consistent failure to construct this station in accordance with its representations." (R. 68). Nine of the twenty-two pages of appellant's petition were devoted to this second issue, wherein appellant carefully outlined the numerous promises made by Coral throughout the course of the Commission proceedings leading up to grant of Coral's original application, promises that Coral would promptly construct the Channel 6 facility. These promises were never fulfilled. Instead, while confining its activity to filing more applications and making more representations as to its intentions to construct, Coral embarked upon a two-year odyssey across Southern Florida and the off-shore Keys in search of a transmitter site to its liking.<sup>24</sup> (R. 79-88). It was because of this

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<sup>24</sup> In the two-year period between grant of Coral's original construction permit in April of 1964, and the filing of the modification application which is the subject of this appeal in March of 1966, Coral

[Cont'd]

extensive past history of representation as to intention to construct, but failure to perform in accordance with the representations, that appellant stated a substantial and material question of fact was presented concerning whether Coral may be relied upon to construct as proposed.

The conclusions drawn by appellant were sharply and extensively disputed by Coral in its opposition to appellant's petition to deny, wherein Coral attempted to show the special circumstances surrounding Coral's previous representations. (R. 188-93). In fact, Coral's opposition contained a nine-page affidavit of its station manager which attempted to explain the reasons why Coral had not undertaken construction at any of the three transmitter sites at which it previously had been given authority to locate. (R. 197-205).

Yet the Commission in adopting its opinion below completely overlooked this substantial controversy. It made neither findings nor conclusions to show that Coral could be relied upon to construct as proposed. In thus failing to dispose of the "substantial issue" raised by appellant, the Commission has acted contrary to the clear statutory mandate of Section 309(d)(2) and the requirements of Section 1.591(c) of the Commission's Rules, 47 C.F.R. § 1.591(c). This failure requires this Court to reverse the Commission's decision. *Hudson Valley Broadcasting Corp. v. FCC*, 116 U. S. App. D.C. 1, 320 F.2d 723 (1963).<sup>25</sup>

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filed two applications to change its transmitter location (BMPCT's-6004 and 6178), one application to change main studio location (BMPCT-6242), and two applications for extension of time within which to complete construction (BMPCT's 6086 and 6176).

<sup>25</sup> As this Court stated in *Louisiana Television Broadcasting Corp.*, *supra*, 121 U.S. App. D.C. at 26 n. 2, "when the Commission has failed to refer to an issue raised in a petition to deny, the Court cannot presume that the Commission considered the issue unimportant."

## VI.

**The Commission Erred in Failing To Designate the Coral Application for Hearing To Determine Whether Coral Had Properly Ascertained the Programming Needs of Its Proposed New Service Area**

As this Court has often stated, it is the well-established policy of the Commission to require each applicant who proposes to move its transmitter site to submit detailed facts on the efforts made by the applicant to ascertain the programming needs and interests of the *entire proposed service area*, and a hearing "is necessary if this kind of programming issue has been raised in a petition to deny." *Louisiana Television Broadcasting Corp.*, *supra*, 121 U.S. App. D.C. at 26 n.5, citing *Wometco Enterprises, Inc. v. FCC*, 114 U.S. App. D.C. 261, 314 F.2d 266 (1963); *Grayson Enterprises, Inc.*, FCC 64-197, 29 Fed. Reg. 3372 (1964).

The petition to deny filed by appellant stated that Coral's application contained no new programming survey to determine the needs and interests of its proposed new service area. (R. 70). Coral, in attempting to rebut this assertion, responded merely that its October, 1965 application to move its transmitter from Ragged Keys Tract No. 4 to Ragged Keys Tract No. 2 contained a 35-page report detailing its programming survey of the various communities within its Grade B contour, and that it has always intended to serve the needs and interests of all communities in the greater Miami area. (R. 180-81). Coral did not state, however, that it undertook any *current* survey or that it ascertained the needs and interests of the *new* areas that it would serve for the first time from its proposed transmitter site on the Florida mainland.

Coral's failure to demonstrate that it has properly ascertained the needs and interests of its entire proposed service area made it mandatory for the Commission to set its application for hearing on this issue. *Louisiana Television Broadcasting Corp.*, *supra*. The Commission erred in summarily disposing of this issue without hearing.

In explaining its conclusion that hearing on this issue was not warranted, the Commission referred to Coral's 1965 survey as being proof that Coral has satisfied the Commission's requirements that all applicants demonstrate their efforts to ascertain the programming needs and interests of their entire proposed service area. (R. 463-64). The Commission's explanation is patently defective.

The Coral application which is now under review proposed to extend Coral's predicted Grade B contour to communities north of Miami, such as Delray Beach, Florida, and to an additional 21,000 persons. (R. 463). These communities had never been previously surveyed by Coral, since they did not lie within Coral's previous proposed service area, and Coral made no attempt to ascertain their specific programming needs and interests. Since it cannot be concluded that Coral has ever ascertained the needs and interests of its *entire* service area, the Commission was compelled to set the Coral application for hearing. *Louisiana Television Broadcasting Corp., supra.*

A further weakness in the Commission's explanation is that no attempt has been made to explain why a programming issue such as requested by appellant was not added in this case, whereas in a similar recent case such an issue was designated for hearing. *Blackhawk Broadcasting Co., 4 F.C.C. 2d 282, 8 RR 2d 238 (1966).* The Commission has recently designated another similar application for hearing on this issue. *St. Anthony Television Corp., FCC 67-598 (May 24, 1967).* It is submitted that the same was required in this case.



## CONCLUSION

The Commission's action granting the Coral application without hearing on the many significant public policy issues raised by the petitions to deny and informal objections was erroneous, an abuse of discretion, and contrary to the mandates of Section 309 of the Communications Act and the express rulings of this Court. In addition, the Commission erred in failing to give an adequate explanation of the reasons for its action, in light of prior Commission decisions and decisions of this Court.

Therefore, this Court should reverse the Commission's action below and remand this case to the Commission for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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June 5, 1967



BRIEF FOR INTERVENOR

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 20,845**

L. B. WILSON, INC.,

*Appellant,*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee,*

CORAL TELEVISION CORPORATION,

*Intervenor.*

**ON APPEAL FROM A MEMORANDUM OPINION AND  
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION**

United States Court of Appeals  
for the District of Columbia Circuit

**FILED** JUL 27 1967

*Nathan J. Pearson*  
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**STATEMENT OF QUESTIONS PRESENTED**

The questions presented, as agreed to by the parties in their Pre-hearing Stipulation, are correctly stated in appellant's brief.

(iii)

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\* Authorities chiefly relied upon are marked by asterisks.





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*ON APPEAL FROM A MEMORANDUM OPINION AND  
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION*

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**BRIEF FOR INTERVENOR**

**COUNTERSTATEMENT OF THE CASE**

Coral Television Corporation (hereafter Coral) in 1964 received a construction permit from the Federal Communications Commission (hereafter Commission) authorizing it to build a television station utilizing Channel 6, which was (and still is) allocated to the City

of Miami, Florida. *Publix Television Corp.*, 36 F.C.C. 1215, 1222, 2 R.R. 2d 481, 489 (1964). Because of technical problems which are described below, Coral's operation as originally proposed did not place a city-grade signal over a substantial portion of Miami and, as a result, Coral's construction permit designated South Miami (a minor suburb) instead of Miami as the station's principal city. A subsequent modification of the construction permit (BMPCT-6178, granted on December 17, 1965) enabled Coral's station to provide a city-grade signal to 89 per cent of the City of Miami.

The application which is the subject of this proceeding involved moving Coral's transmitter location and increasing antenna height, so that city-grade service to Miami would be expanded from 89 per cent to 99.89 per cent of the city. Based upon this improvement, a change in principal city designation from South Miami to Miami was sought.<sup>1</sup> 16.) And since the proposed new antenna site would be 215.6 miles from the site of co-channel Station WDBO-TV, Orlando, Florida, and the Commission rules provide a 220-mile separation for these stations, a waiver of the Commission's mileage separation rule (Section 73.610) was requested (R. 54-57).

The origin of the technical problems which have hampered Coral from the time its construction permit was issued, and which give rise to this case, is to be found in the Commission's 1957 allocation of a fourth VHF channel, on Channel 6, to Miami. *Miami Drop-in Case*, 22 F.C.C. 1238, 15 R.R. 1638a (1957), reconsideration denied, 15 R.R. 1642a (1958). In making this allocation, the Commission recognized, both in its Report and Order and in its order on reconsideration, that mileage separation regulations would require the transmitter site for a Channel 6 station to be located "south of Miami" and that prevailing aeronautical considerations might then

<sup>1</sup> The Commission's rules require 100 per cent city-grade coverage of the designated principal city, and since Coral would fall short of this by 0.11 per cent, a waiver of the rule was requested (R. 57).

preclude an antenna tower of sufficient height to enable the station fully to cover Miami with the requisite city-grade signal. 15 R.R. at 1640-41, 1642c-42d. Thus, the Commission said in its order on reconsideration (p. 1642c):

We also adhere to the view that, on the basis of the record, the allocation of Channel 6 to Miami should not be precluded because of the possibility that a site for such an operation meeting all spacing and coverage requirements might be infeasible because of aeronautical considerations. . . . As we stated in our prior decision, the question of aeronautical hazards and limitations is one which can more readily be resolved . . . at a time when particular applications with specific proposals for tower location and height are before us. [Footnote omitted.]

Importantly, the Commission expressly noted the possibility that it might ultimately be forced to waive its mileage separation requirements (p. 1642d):

Whether we might subsequently in an appropriate adjudicatory proceeding waive the rules with respect to separations if it should be determined in the light of specific cases that adequate coverage of Miami cannot be provided from antennas at sites which are both consistent with the rules and do not involve untoward hazards to air navigation we need not decide here.

Notwithstanding these potential difficulties, the Commission concluded that "the allocation of Channel 6 to Miami would serve the public interest . . ." (p. 1642). In its order on reconsideration, the Commission stated (p. 1642c):

. . . there is no doubt in our minds that the assignment of an additional VHF channel to Miami is necessary to provide greater opportunities for television growth and for comparable and effective competition among stations in the area so as to insure more and better television service to the public.

The grant of Coral's construction permit on April 29, 1964 followed a protracted comparative proceeding in which, as the Commission had anticipated, all of the applicants had difficulty in locating their transmitter sites due to prevailing aeronautical limitations on antenna tower heights. The site then proposed by Coral — located on a tiny island in Biscayne Bay, Ragged Key No. 2, several miles offshore southeast of Miami — afforded the best coverage of Miami of any of the three applicants. Even so, as noted above, it failed to provide a principal city-grade signal to a substantial part of Miami, and Coral was required to specify South Miami, a community of 7,600 persons located 1-1/2 miles from Miami's southern tip, as its principal city.<sup>2</sup> Although its permit was thus issued for South Miami, there was no question that Coral proposed to serve the entire Miami area. And the Commission's order granting the construction permit referred to the "establishment of a new television broadcast service in the area of Miami, Florida" (2 R.R. 2d at 489).

In the period which followed the grant, Coral's efforts to build its facility and to commence broadcast operations met with a long series of obstacles, delays and frustrations, largely at the hands of local government and Federal aviation officials.<sup>3</sup> It was not until late 1965 or early 1966 that the Federal Aviation Agency indicated that it would permit Coral to build on the mainland, south of Miami, a transmitter tall enough to provide adequate coverage of Miami. The situation was summarized by Coral in a pleading filed with the Commission (R. 317):

Because of antenna tower height limitations applicable to the area immediately south of Miami and imposed

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<sup>2</sup>Initial Decision of Hearing Examiner Forest L. McClenning, released Sept. 12, 1960, FCC 60D-113-93495, pp. 4, 31-32, 39, 50.

<sup>3</sup>A detailed chronological account of these events is contained in the Affidavit of Robert L. Johns, Ex. No. 1 to Coral's Opposition to the L. B. Wilson, Inc. Petition to Deny, May 12, 1966 (R. 197-205).

by then-prevailing FAA policies, Coral's original application for Channel 6 specified a South Miami station with an antenna site on an island in the off-shore Ragged Keys in Biscayne Bay. This original site was later found to be unsuitable for increases in antenna height (due to the small land area of the island). Successive moves to other Ragged Key islands were initially frustrated by local government rulings and, when the FAA made known for the first time in late 1965 and early 1966 that suitable arrangements could be made for tall towers in the area of Homestead, Florida, serious consideration had to be given to use of this new area from the standpoint of improved service to the area, efficiency of operation and utilization of the frequency.

Not surprisingly, the unexpected delays and expenses suffered by Coral, without any offsetting income, caused a heavy financial drain on the company. As a consequence, C. Terence Clyne in 1965 became a substantial minority stockholder in Coral, and he was at the same time successful in obtaining a substantial bank loan for the company (R. 184). These facts, which were fully and promptly disclosed to the Commission (BMPCT-6178), have nonetheless given rise to appellant's claims in this proceeding concerning an alleged unauthorized transfer of control.

The instant application was filed on March 15, 1966. It sought a change in transmitter site location to a mainland site south of Miami, near Homestead, Florida, 17.1 miles from the previously authorized site, which was located offshore on Ragged Key No. 3. The proposed modification, as noted above, would permit Coral to cover over 99 per cent of the City of Miami with a city-grade signal, in lieu of the 89 per cent coverage predicted from the previous site. It would also permit Coral to extend its Grade B contour to include an additional 21,000 persons. An improved signal would be provided to about 127,000 persons within the proposed Grade A contour and 256,000 persons within the proposed principal city contour. With

regard to the requested waiver of the Commission's mileage separation rules, Coral pointed out that it had been unable to locate a site affording adequate coverage of Miami which complied both with aeronautical and separation requirements. And with respect to the requested change from a South Miami to a Miami designation, Coral stressed that Channel 6 had originally been assigned to Miami and that only due to technical difficulties was Coral initially given a South Miami designation.<sup>4</sup> (R. 1, 7-9, 215-17, 221-22, 459-62.)

Petitions to deny were filed against Coral's application by appellant, a VHF licensee in Miami, and Storer Broadcasting Company, the holder of a construction permit for a UHF facility in Miami.<sup>5</sup> No objection was made by the Orlando station affected by the short-spacing.<sup>6</sup> Appellant's petition, relying exclusively on information on file with the Commission, charged that an "apparent unauthorized transfer of control" of Coral to Mr. Clyne had occurred (R. 68, 74). Appellant also attacked Coral's alleged failure to construct the station as promptly as it had told the Commission it would; challenged its financial qualifications; asserted an adverse impact upon UHF development in Miami if Coral's application were granted; opposed waiver of mileage separation requirements; and disputed the adequacy of Coral's efforts to determine program needs (R. 68-70). The Storer petition was directed solely to the alleged impact of a grant of

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<sup>4</sup>Over a month earlier, on Feb. 2, 1966, Coral had applied to the Commission for permission to move its main studio to Miami. This application was granted on March 24, 1966 (R. 8, 461).

<sup>5</sup>A third petition, filed by the licensee of a Palm Beach station, was later withdrawn and was treated by the Commission as "moot." Informal objections were filed by the Association of Maximum Service Telecasters, Inc. (R. 459).

<sup>6</sup>Coral and the Orlando station (WDBO-TV), which also desired to change its transmitter site location, agreed to afford one another "equivalent protection," and the latter joined in requesting waiver of the Commission's separation rules (R. 460).



Coral's application upon UHF operations in Miami. The gist was that although Storer had assured the Commission in May 1965 that it would "reconstruct and reactivate" its UHF facility in Miami (WGBS-TV), the grant of Coral's application "would make impracticable the resumption or continuation of WGBS-TV's operations at this time." (R. 487-88.)

Coral filed oppositions to both appellant's and Storer's petitions. With regard to the transfer of control issue, Coral pointed out that all pertinent facts had been promptly filed with the Commission and denied that a transfer had occurred. As to the alleged impact on UHF, Coral noted that a fourth VHF channel had been allocated to Miami since 1957 and that the proposed change of transmitter site would, in substance, do little more than increase its city-grade coverage from 89 to 99 per cent of the city. Coral challenged Storer's claim of threatened injury. (R. 170-73, 181-88.)

In a Memorandum Opinion and Order released February 15, 1967, the Commission <sup>7</sup> granted Coral's application without hearing finding that "no substantial or material questions of fact have been raised" and that "grant of the application would serve the public interest, convenience and necessity" (R. 467). The Commission reviewed the circumstances of the allocation of Channel 6 to Miami and said (R. 461):

Coral's present facilities would enable it to provide a principal city signal to nearly 90% of the City of Miami. Realistically, the station is, except nominally, already a Miami station, as it was intended to be. No person who would be within the presently authorized Grade B contour of the station will be deprived of that service, but a stronger signal will be provided to more

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<sup>7</sup>Commissioner Cox concurred in the result, and Commissioners Bartley, Lee and Johnson dissented without opinion.

than 127,000 persons within the proposed Grade A contour and 256,000 persons within the proposed principal city contour.

In deciding to waive its mileage separation requirements, the Commission stated (R. 462):

The Commission has, for many years, been keenly conscious of the problems involved in locating appropriate sites for broadcast towers in the Miami area. We think that the proposal before us represents the best opportunity to provide Miami with a fourth competitive VHF television service with a reasonable assurance of economic viability and deference to air safety considerations. On balance, it seems clear that those detriments flowing from operation in derogation of our rules to the extent here involved are far outweighed by the public interest considerations inherent in the early inauguration of another VHF television service to Miami and greater service to more persons with no loss to any.

The Commission rejected the contention that UHF broadcasting in Miami would be adversely affected by a grant. It pointed out that there would be only a 1.6 per cent increase in population within the proposed Grade B contour and that "Storer has not shown that, of well over 1,000,000 persons in the Greater Miami area, coverage by Coral of an additional 21,000 for the first time would be of any significance" (R. 463). The Commission found that "Storer has not addressed itself specifically to the question of how the proposed improvement of signal strength would adversely affect UHF development and success in Miami, whereas operation by Coral as presently authorized would not" (R. 463). It concluded (R. 463):

Storer's failure to make specific allegations of fact on this point is, we think, fatal to its contentions of adverse impact on UHF broadcasting. . . Moreover, where, as here, UHF and VHF stations are authorized to the

same community, the existence of the former does not, *per se*, operate to preclude improvement of the facilities of the latter. Requests for changes of VHF stations from time to time are to be expected, and UHF stations in the same community must be aware of this. In opposing such changes, the UHF stations are bound to allege specific facts to show that such changes would not be in the public interest. This Storer has failed to do. [Footnote omitted.]

With respect to the alleged unauthorized transfer of control, the Commission, after a careful review of the facts, found that there had *not* been a *de facto* transfer of control to Mr. Clyne as claimed by appellant (R. 464-67). It did find, however, that "[a]lthough voting control remains in the hands of the original stockholders, legal title to a majority of the stock had passed to others" <sup>8</sup> and that "such a situation constitutes a technical transfer of control requiring the filing of an application for Commission consent." (R. 467.) The Commission added (R. 467):

It is clear that Coral made no attempt to conceal or misrepresent the facts with respect to control of the corporation, and we believe that the circumstances were such that reasonable men could differ as to whether there was a transfer of control. Coral's failure to file an application for our consent to the transfer of control was an excusable one and Coral should not be penalized for an honest error in judgment. We will require Coral to file a short-form application for transfer of control, but with all of the facts before use [*sic*], we see no reason to defer action on the application now before us.

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<sup>8</sup>Voting control of 50.4 per cent of the Coral stock was retained by the original stockholders, but two of them placed 3 and 4 per cent of the stock, respectively, in the names of members of their families, so that the original stockholders retained legal title to 43.4 per cent (R. 465).

(Coral subsequently filed a short-form application for Commission consent, which was approved by the Commission on March 31, 1967 (FCC File No. BTC-5281; FCC Report No. 6404, Public Notice 98323, April 4, 1967).)

Finally, the Commission, after discussion, rejected appellant's claims concerning Coral's financial qualifications and the adequacy of its efforts to determine program needs (R. 463-64).

Appellant filed its notice of appeal on March 17, 1967. Five weeks later, on April 21, 1967, it filed a petition for a stay of the Commission's order, which this Court denied on May 25, 1967.

#### STATUTE INVOLVED

Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309, is set forth in an appendix to this brief.

#### SUMMARY OF ARGUMENT

I. The Commission did not err in granting Coral's application on the basis of the pleadings and without an evidentiary hearing. Section 309 of the Act was amended in 1960 to afford the Commission increased discretion in deciding whether to hold evidentiary hearings and not to require such hearings where, as in this case, petitions to deny failed to contain "specific" factual allegations.

A. The petitions to deny failed to raise a substantial and material question of fact regarding alleged UHF impact. The factual allegations of Storer (who has chosen not to appeal but upon whose representations below appellant wholly relies) lacked the specificity required under Section 309. Its assertions of economic injury flowing from a grant of Coral's application were conclusionary in character and failed to indicate how Coral's proposed operation would result in greater injury to UHF stations than would its operation under its then-existing permit. In the absence of "specific allegations

of fact" showing injury, the Commission was not required to hold an evidentiary hearing on the UHF impact issue. *Lee v. FCC*, 374 F.2d 259 (D.C. Cir. 1967).

B. Nor was a hearing required on the short-spacing issue. The record here establishes, and the Commission found, that Coral simply could not locate a site affording adequate coverage of Miami which at the same time complied with both separation and aeronautical requirements. The short-spacing is only 4.4 miles (and is the subject of an "equivalent protection" agreement), and the proposed modification would result in improved service to a substantial number of persons without loss of service to anyone. In these circumstances (including the fact that the co-channel station in Orlando, Florida, is agreeable to the waiver), the Commission plainly acted within its discretion in granting a waiver of its mileage separation rule without a hearing. *Capitol Broadcasting Co. v. FCC*, 116 U.S. App. D.C. 370, 324 F.2d 402 (1963).

C. With regard to the alleged unauthorized transfer of control of Coral, appellant relied entirely on information which Coral had filed with the Commission, and its contention, in substance, is that the Commission should have drawn a different conclusion from the facts before it. But the Commission carefully considered the issue, and its conclusion, which is a rational one based on substantial and undisputed evidence, is entitled to stand.

D. Appellant's asserted *Suburban* issue, based on Coral's failure to survey separately the program needs of 21,000 newly-served persons in the Delray Beach area, is frivolous. Four and one-half months prior to the instant application, Coral submitted an extensive program survey covering the program needs and interests of the entire Miami metropolitan area, which survey showed a substantial homogeneity of program needs among 28 communities in which interviews were conducted. In these circumstances, a *Suburban* issue is

not presented merely because interviews were not conducted in Delray Beach, a community of fewer than 21,000 persons, comprising less than 1.6 per cent of the population in Coral's Grade B contour, particularly when there is no reason to believe that Delray Beach's program needs are different from those of other nearby communities.

II. The Commission adequately explained the reasons for its decision. Section 309(d)(2) of the Act requires only that the Commission give a "concise statement of [its] reasons," and the Commission's careful and clear opinion in this case fully satisfied that requirement. In addition, the Commission's opinion disposed of all "substantial" issues raised below. Appellant's contention that Coral could not be relied upon to construct its station was a mere make-weight (which now has even less substance in view of appellant's recent efforts to obtain a stay of Coral's construction activity), and the Commission was not required expressly to deal with it.

III. There is no merit in appellant's contention that the Commission failed to explain the allegedly disparate treatment given Coral's application as compared with others which appellant views as "similar." The Commission, in disposing of a petition to deny, is not required to catalogue all arguably "similar" past cases and delineate every factual distinction on which it has relied in reaching various results. In any event, the Commission's decision in this case is entirely consistent with its past decisions, and the cases cited by appellant involved sharply differing fact situations and are inapposite.

## ARGUMENT

## PRELIMINARY STATEMENT

At the outset, two features of the instant case should be noted. First, it is significant that no UHF operator is appealing the Commission's action, nor is the Orlando, Florida, station whose transmitter site would be slightly short-spaced by Coral's proposed site. The sole appellant here is Wilson, a Miami VHF licensee, whose evident purpose is to forestall as long as possible the advent of a comparative service which the Commission, in proceedings no longer subject to challenge, has determined to be required by the public interest. In furtherance of this purpose, appellant utilized the Commission's procedures to raise a plethora of issues and, having been unsuccessful before the agency, now brings its "scattershot" technique to this Court. "[T]he temptation to an existing licensee to postpone as long as possible the advent of competition," the Court stated in a similar context, "warrants special care by the Commission [and, presumably, the Court also] in the scrutiny of requests for hearing . . . ." (*Southwestern Operating Co. v. FCC*, 122 U.S. App. D.C. 137, 138, n.2, 351 F.2d 834, 835 n.2 (1965)). Second, it may be noted that the Commission's action is very limited in scope. As shown in the Counterstatement of Facts, it permits a change in transmitter site location to a more feasible location and an increase in antenna height (but with decreased visual power). The population within Coral's Grade B contour would be increased by only 21,000, or 1.6 per cent, and there would be no loss of service to any person. With regard to the change in principal city designation, it had always been contemplated that the station would serve the City of Miami, and authorization to have its main studios in Miami rather than South Miami was previously granted without objection.



**The Commission Properly Determined the Relevant  
Public Interest Factors From the Pleadings Without  
the Necessity of a Hearing**

Appellant's principal contention is that the Commission erred in granting Coral's application without hearing. In appellant's view, the Commission found improperly that no substantial and material question of fact was presented and that grant of Coral's application was consistent with the public interest (see Sections 309(d) and (e) of the Act).<sup>9</sup> In responding to appellant's contention, we believe it helpful first to review briefly the development of the criteria now contained in Section 309.

Under the Communications Act as originally enacted, the ordering of hearings on objections interposed to applications for new or modified facilities was left largely to the discretion of the Commission. In 1952, Congress amended the Act to include Section 309(c) which provided for a post-grant "protest" procedure. It was intended that this procedure would allow parties in interest an opportunity to be heard if they raised "legitimate public interest considerations" indicating that authorization without a hearing should not have been granted.<sup>10</sup> But the 1952 amendment was construed by the Commission and the courts as requiring virtually an automatic hearing if the protestant could show that he was a legitimate party in interest and "specified with particularity" some fact or situation which, if proved at a hearing, would tend to show that the grant contravened the public interest or that the applicant was unquali-

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<sup>9</sup>Communications Act of 1934, 47 U.S.C. §§ 309(d) and (e), *as amended*, (Supp. V, 1964).

<sup>10</sup>S. Rep. No. 1231, 84th Cong., 1st Sess. 2 (1955).

fied.<sup>11</sup> *Federal Broadcasting Sys. v. FCC*, 96 U.S. App. D.C. 260, 263, 225 F.2d 560, 563 (1955).

It soon became clear to the Commission and to the Congress that Section 309(c) was leading to serious abuses, since protesting parties, especially potential competitors, found in it a ready vehicle for obstruction.<sup>12</sup> Thus, the Senate Commerce Committee stated in 1959:

Unfortunately, the existing mandatory protest procedures leave the Commission little discretion to dispense with useless or even frivolous proceedings. While protests must be filed under oath, the factual allegations may be based upon information and belief, which unfortunately encourages the filing of ill-founded protests with allegations based not on known facts, but on suspicion or less. Protest hearings have created immeasurable delays in bringing service to the public, but have resulted in few final reversals of grants.<sup>13</sup>

In the 1960 amendments to the Communications Act, Section 309(c) was radically revised. Noting that Section 309(c) had proved to be "a most effective device for delaying the disposition of Commission business,"<sup>14</sup> Congress made changes designed to remove the potential for abuse. The amendment to Section 309 substituted the pre-grant petition to deny for the previous protest procedure,

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<sup>11</sup>In 1956, Section 309(c) was amended to provide, *inter alia*, that a full hearing would not be required if after oral argument the Commission determined that the facts alleged in the protest, even if true, would not be justification for setting aside the grant. Ch. 1, § 309(c), 66 Stat. 715 (1956).

<sup>12</sup>See H.R. Rep. No. 1800, 86th Cong., 2d sess. 9-13 (1960); S. Rep. No. 690, 86th Cong., 1st Sess. 1-7 (1959).

<sup>13</sup>S. Rep. No. 690, at 2.

<sup>14</sup>H.R. Rep. No. 1800, at 9.

and major changes were made regarding the character of the factual allegations required to be made in petitions to deny. The Senate report, describing the new procedures, stated:

Thus, a petitioner must make a substantially stronger showing of greater probative value than is now necessary in the case of a post-grant protest. The allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by generalized affidavits, as is now possible with protests, are not sufficient.<sup>15</sup>

In construing the 1960 amendments to Section 309, this Court has recognized that Congress imposed "more rigorous pleading requirements" and that it "intended to vest in the FCC a large discretion to avoid time-consuming hearings whenever possible. . . ." *Southwestern Operating Co. v. FCC*, *supra*, at 138 & n.2, 351 F.2d at 835 & n.2; see *American Fed'n of Musicians v. FCC*, 123 U.S. App. D.C. 74, 79, 356 F.2d 827, 832 (1966). And, of particular pertinence here, this Court has pointed out that "[i]n order to serve the basic interest of the public the Commission is entitled to insist upon more than conclusional allegations easily made and which, if accepted, entail unjustified delay and consumption of the Commission's time and energy." *Folkways Broadcasting Co. v. FCC*, 375 F.2d 299, 303 (D.C. Cir. 1967); see *Lee v. FCC*, 374 F.2d 259 (D.C. Cir. 1967); *National Broadcasting Co. v. FCC*, 124 U.S. App. D.C. 116, 128-29, 362 F.2d 946, 958-59 (1966); see also dissenting opinions in *Southwestern*, *supra*, at 141-42, 351 F.2d at 838-39 (Bazelon, C.J., dissenting), and *Folkways*, *supra*, 375 F.2d at 308-09 (Tamm, J., dissenting).

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<sup>15</sup>S. Rep. No. 690, at 3.

A. Alleged UHF Impact

Channel 6 was finally allocated to Miami in 1958. From that time forward, it constituted a competitive reality for local VHF and UHF stations. By virtue of its authorized facilities prior to the instant grant, Coral could cover nearly 90 per cent of the City of Miami with a city-grade signal and the rest of the city with a Grade A signal (R. 461, 495). However, Storer Broadcasting Company, a UHF permittee in Miami (WGBS-TV, Channel 23), filed a petition asserting that a grant of Coral's present application -- which would merely improve the quality of the signal in some areas already covered and add only 21,000 people to the Grade B contour -- would cause Storer to abandon its plan to reactivate its UHF station. Appellant relies entirely on the Storer pleading in asserting that a "UHF impact" issue is presented here, requiring a hearing. (Brief at 15.)

Certain facts should first be noted in connection with appellant's assertion that grant of the instant application was a decisive factor in Storer's determination whether to reactivate its Miami UHF facility. Storer's UHF station had been off the air since April 1957 (R. 485), without any actual competition from Channel 6. Yet appellant would have the Court believe that after almost a decade off the air Storer intended to base its decision on whether to resume operations upon whether Coral (which has not yet even begun operating) would be permitted to make modest improvements in its proposed service. That the instant proceeding had no bearing on Storer's decision is evidenced by the fact that on December 5, 1966, over two months *prior* to the Commission's grant herein, John E. McCoy, Vice President and Secretary of Storer, testified under oath in another Commission proceeding that Storer did not intend to re-

activate its Miami UHF facility and was then seeking to dispose of it to "somebody who will put it on the air." <sup>16</sup>

In any event, it is evident, as the Commission found, that Storer failed to make "specific allegations of fact" (§ 309(d)) sufficient to require a hearing. Aside from some general observations regarding "present conditions in the Miami television market," the only factual allegation by Storer which appellant cites is Storer's statement that Coral's proposed modification would provide an improved signal to 127,705 persons within the proposed Grade A contour and 255,797 persons within the proposed principal city contour (see Brief at 15-16). But this allegation, which the Commission apparently accepted (see R. 461), falls far short of establishing material injury to Storer, and, as the Commission found, Storer wholly failed to explain "how the proposed improvement of signal strength would adversely affect UHF development and success in Miami, whereas operation by Coral as presently authorized would not." (R. 463.) Nor did Storer explain why "coverage by Coral of an additional 21,000 [within its Grade B contour] for the first time would be of any significance." (*Id.*) The existence of UHF authorizations, as the Commission pointed out, does not operate *per se* to bar improvement of VHF facilities, and

<sup>16</sup>The testimony referred to reads:

"Q: Is the present intention of the Storer organization to activate this Miami UHF?

"A. No, we are endeavoring to dispose of the UHF station to somebody who will put it on the air -

"Q: Have you so informed the Commission, sir?

"A: We have but informally, however."

Transcript of Proceedings, *Charles W. Dobbins*, FCC Docket No. 15752, pp. 5868-69. Opposition of the Federal Communications Commission to Petition for Stay, Attachment B, filed in this proceeding on May 2, 1967.

On June 30, 1967, Storer, as assignor, and Coastal Broadcasting System, Inc., as assignee, filed with the Commission an application for assignment of WGBS-TV (FCC File No. BAPCT-407). Under the terms of their agreement Storer will continue preparations for reactivation of the station.

"[i]n opposing such changes, the UHF stations are bound to allege specific facts to show that such changes would not be in the public interest." (*Id.*) "This," the Commission correctly found, "Storer has failed to do." (*Id.*)

The correctness of the Commission's determination that a hearing was not required on the UHF impact issue follows plainly, if not *a fortiori*, from this Court's recent decision in *Lee v. FCC*, 374 F.2d 259 (D.C. Cir. 1967), *aff'g Atlantic Telecasting Corp.*, 3 F.C.C. 2d 442, 7 R.R.2d 297 (1966). In *Lee*, as here, a proposed change in a VHF transmitter location and antenna height was objected to on the ground that it would adversely affect UHF development and, as here, the asserted injury was alleged in conclusionary terms. But in *Lee* the proposed changes would have resulted in a 105 per cent increase in population within the station's Grade B contour, as compared to 1.6 per cent in this case, and the applicant in *Lee* sought to place a city-grade signal over a major community far outside its primary service area, while Coral seeks to improve its signal only in the community which it was authorized to serve. Notwithstanding that the proposed changes in *Lee* were very substantial (as compared to this case), the Commission granted the application without hearing, stressing the absence of specific factual allegations to support the claim of injury to UHF. 3 F.C.C.2d at 444-45, 7 R.R.2d at 297. This Court affirmed,

The deep concern of the Commission for protection of UHF stations is not doubted and is well documented, but it is not controlling on the issue of a hearing in all circumstances. <sup>17</sup>

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<sup>17</sup> 374 F.2d at 260. Appellant's reliance on *Louisiana Television Broadcasting Corp. v. FCC*, 121 U.S. App. D.C. 24, 347 F.2d 808 (1965), is clearly misplaced. The proposed modification in that case was, in substance, a re-allocation of a VHF channel from Houma, Louisiana to Baton Rouge (60 miles away) and "many significant policy issues" were raised (*Id.* at 26, 347 F.2d at 810). The instant case, by contrast, involves relatively minor improvements in service directed solely to the community which applicant was originally licensed to serve.



Here, as in *Lee*, the petitioners below failed to make specific factual allegations to show that the applicant's proposed operation would have a more adverse impact upon UHF development than would its operation under its then-existing permit.<sup>18</sup> Their allegations of "ultimate, conclusionary facts" (S. Rep. No. 690, at 3) were insufficient under Section 309 (as amended by the 1960 amendments) to require the Commission to hold a hearing. See *National Broadcasting Co. v. FCC*, 124 U.S. App. D.C. 116, 129, 362 F.2d 946, 959 (1966).<sup>19</sup> Any other conclusion, it is clear, would permit existing licensees to delay substantially the commencement or improvement of a competing service, as appellant seeks to do in this case, merely by alleging in general terms that UHF development would be injured.

B. Short-spacing

Appellant does not contend that material issues of fact were raised in regard to the short-spacing issue. Rather, it argues that the Commission could not, as a matter of law, determine without a hearing that the public interest would be served by waiver of its mileage separation rules. We disagree.

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<sup>18</sup> Although the petitioners were put on notice by the Commission's opinion and order that their factual allegations were deemed inadequate, they made no effort to supply more specific information via a petition for reconsideration or otherwise. Compare *KGMO Radio-Television, Inc. v. FCC*, 119 U.S. App. D.C. 1, 336 F.2d 920 (1964).

<sup>19</sup> The Court there stated:

Section 309 requires the Commission to hold a hearing only where 'substantial and material questions of fact' are presented. In view of KGEM's failure to allege any specific facts relating to the above [Carroll] questions, the Commission's determination that no such substantial and material questions of fact were presented requiring resolution by way of evidentiary hearing was clearly a permissible exercise of discretion by the Commission.



In allocating Channel 6 to Miami in 1958, the Commission not only foresaw that the combination of mileage separation and aeronautical requirements would pose serious difficulties in locating a transmitter site, but it expressly noted that a waiver of mileage separation requirements might ultimately have to be granted (*see* p. 3, *supra*; R.461). The instant record details in full the obstacles and frustrations which Coral met in attempting to find a suitable transmitter site and that the site presently proposed is located as far as possible from the co-channel Orlando station without violating aeronautical requirements. The Commission found that "Coral has shown that it *could not locate*" a site which afforded adequate coverage of Miami and at the same time complied both with mileage separation and aeronautical requirements. (R. 461, emphasis added.) The Commission concluded that the detriments arising from a 4.4 mile short-spacing (which, as noted above, is the subject of an equivalent protection agreement between Coral and the co-channel Orlando station) were "far outweighed by the public interest considerations inherent in the early inauguration of another VHF television service to Miami and greater service to more persons with no loss to any." (R. 462.)

Appellant contends, however, that the Commission "abused its discretion" in reaching this conclusion (Brief at 21). It argues, first, that the Commission, in allocating Channel 6 to Miami, had determined that a suitable transmitter location could be found without infringing mileage separation requirements. But appellant has not given a fair reading to the opinions in the *Miami Drop-in Case, supra*, since the Commission there clearly indicated that it might subsequently waive its mileage separation rules "in an appropriate adjudicatory proceeding" if it should find — as it now has (R. 461) — that "adequate coverage of Miami cannot be provided from antennas at sites which are both consistent with the rules and do not involve untowards hazards to air navigation . . . ." (15 R.R. at 1642d.) Although appellant attacks as "undocumented" Coral's position that it could

not locate a suitable site which would meet both mileage separation and aeronautical requirements (Brief at 21-22), the fact is that Coral's position was fully documented (see R. 190-03, 198-205, 217, 221-22) and that appellant has failed to present a shred of evidence to suggest that a suitable site meeting all requirements was in fact available.

Appellant further argues (Brief at 22) that "UHF impact" considerations required denial of the short-spacing waiver. But the Commission's mileage separation requirements are principally designed to protect the service areas of co-channel or adjacent channel stations against technical interference, not to protect UHF stations against economic competition.<sup>20</sup> Moreover, since the allegations of injury to UHF development were not sufficiently specific even to require a hearing (pp. 17-20, *supra*), they surely did not require denial of the short-spacing waiver as a matter of law.

The propriety of the Commission's determination of the short-spacing issue without hearing is fully confirmed by this Court's decision in *Capitol Broadcasting Co. v. FCC*, 116 U.S. App. D.C. 370, 324 F.2d 402 (1963).<sup>21</sup> The Court there affirmed the Commission's waiver of spacing requirements without a hearing and stated (*Id.* at 373, 324 F.2d at 405):

We agree with the Commission that no substantial and material questions of fact were presented by the plead-

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<sup>20</sup>Sixth Report and Order on Television Allocations, 1 R.R. [Reports] part 3, ¶¶ 91:601, 91:636-37 (1952).

<sup>21</sup>The *Louisiana Television* case, *supra*, upon which appellant again relies, is not in point. The proposed modification there — which was in effect a re-allocation of the VHF channel to another city 60 miles away, in contravention of Commission policy established in a prior rulemaking proceeding — was wholly unlike Coral's proposal, which would affect only minor changes resulting in improved service to the community that it was originally licensed to serve. (See p. 19, note 17, *supra*.)

ings and attachments that could not be and were not resolved as a matter of law. The Commission further found that the modification of the New Orleans TV construction permit would result in a substantial net gain in coverage and that no showing had been made that this would be inconsistent with the public interest. Equivalent protection from interference, which was thought to be adequate as of the present time, was afforded to Capitol. We cannot say that these conclusions are without support and are erroneous. The conditions set forth in Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), for the holding of a hearing under that section thus are not present here.

C. Alleged Unauthorized Transfer of Control

Appellant contended before the Commission that a stock purchase agreement, which had been duly filed with the Commission and made part of a Coral application long since granted by the Commission,<sup>22</sup> was indicative of an unauthorized *de facto* transfer of control of the corporation to a single minority stockholder, C. Terence Clyne (R. 70-79). Significantly, appellant alleged no new facts to support its argument, relying instead solely upon its construction of the terms of the stock purchase agreement and related information filed by Coral with the Commission. Appellant now contends that the Commission erred in the conclusions which it drew from the facts and that it should have held an evidentiary hearing on the point.

The Coral stock purchase agreement was entered into on October 14, 1965 and was duly filed with the Commission fifteen days later (R. 183). Under its terms, Mr. Clyne purchased 200 shares (40 per cent) of the Coral stock, became executive director of the corporation, agreed to obtain for Coral a bank loan of \$600,000,

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<sup>22</sup>BMPCT-6178, filed October 29, 1965, granted December 17, 1965; R. 183-84.

and was entitled to name three of the seven members of the Coral board of directors (R. 466). The agreement gave all of the stockholders preemptive rights to purchase new stock issued by Coral, as well as rights of first refusal as to sales by one another.<sup>23</sup> It also provided that a sale of the station would require approval by holders of 65 per cent of the stock. Mr. Clyne's interest was in early 1966 reduced to 35 per cent by the sale for full consideration of 25 shares (5 per cent) of the Coral stock to Hy Gardner and members of his family (R. 183).

It is important first to note that the transfer of control issue has only very limited relevance to Coral's instant application. Whether there has been an unapproved transfer of control would be relevant, if at all, to the grant or denial of the application for technical changes in transmitter site location and principal city designation only if such transfer was so flagrant and in such bad faith as to preclude a favorable public interest determination on the subject application. The Commission here reviewed the facts with considerable care and concluded that at most a "technical" transfer of "*de jure* control" (but not voting control) had occurred (R. 467).<sup>24</sup> It found that Coral "made no attempt to conceal or misrepresent the facts"; that "reasonable men could differ as to whether there was a transfer of control"; and that Coral's failure to apply for consent was "an honest error in judgment." (*Id.*) Significantly, even appellant does not cite a single fact to suggest bad faith on Coral's part.

In concluding that there had not been a *de facto* transfer of control to Mr. Clyne, the Commission relied on the fact that he "exercises no prerogatives or powers which are inconsistent with his

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<sup>23</sup>R. 185. Appellant erroneously implies that these rights, held reciprocally by all of the Coral stockholders, were acquired by Mr. Clyne alone (Brief at 25).

<sup>24</sup>See p. 9, note 8, *supra*. This "technical" transfer was approved by the Commission on March 31, 1967 (p. 9, *supra*).

position as the largest single stockholder"; that he cannot alone block the sale of the station; that he and his appointees do not have voting control of Coral's stock; that he cannot control the Board of Directors or "corporate policies"; and that he had not "furnished" a large loan to Coral but "merely obtained" such a loan for it. (R. 466-67.) Surely, the Commission's conclusion was based on substantial evidence and was a rational inference from the facts.

Appellant's contention here, in essence, is that the Commission should have drawn different inferences than it did from the facts before it. But so long as the Commission acted rationally and on the basis of substantial evidence, its conclusions are entitled to stand. And, further, there is simply no basis in law — and none is cited — for appellant's apparent contention that the mere addition of a new stockholder by Coral requires the Commission to conduct "the same type of evidentiary hearing process that Coral went through in order to obtain its construction permit in the first instance." (Brief at 27.)

#### D. Alleged Suburban Issue

In a transparent attempt to bring this case within the purview of *Louisiana Television Broadcasting Corp. v. FCC, supra*, appellant asserts that the Commission erred in failing to designate for hearing a *Suburban*<sup>25</sup> question (i.e., whether Coral had adequately ascertained the program needs of its service area). This asserted issue (which is not included among the stipulated issues set forth in appellant's Questions Presented) is without substance.

The record reflects that Coral submitted to the Commission on October 29, 1965 (in file No. BMPCT-6178) an extensive program survey report explaining in detail the efforts it had made to ascertain

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<sup>25</sup>Patrick Henry v. FCC, 112 U.S. App. D.C. 257, 302 F.2d 191, 23 R.R. 2016, cert. denied, 371 U.S. 821 (1962).

local television program needs and interests through personal interviews with more than 500 persons living in 28 communities throughout the Miami metropolitan area, including portions of Dade, Broward and Monroe Counties (R. 180-81). In the instant application, which was filed only four and one-half months later, Coral stated that this extensive study (which had indicated a homogeneity of viewer preferences throughout the area) formed the basis for its program proposal designed to meet the needs of the entire Miami metropolitan area and that no changes in the program proposal would be necessitated by the requested modification in facilities. (R. 9.)

Appellant contended before the Commission, however, that a *Suburban* issue existed because of Coral's failure to ascertain the program needs of newly-served areas — whose population, we note, totaled only 21,000, located principally in Delray Beach, Florida, a small community located to the north of Miami. The Commission rejected appellant's contention (R. 463-64). Citing Coral's detailed program survey in late 1965 and its position that "it was a Miami station and . . . has, for this reason, formulated its programming proposal to be responsive to the needs of the entire Miami area," the Commission concluded (R. 464):

This is a rational and reasonable approach, and in view of the submission of the extensive survey report, we are satisfied that Coral has met the requirements of *Suburban*.

Appellant now argues that the Commission erred in its conclusion because Coral's program surveys were not current and did not cover the program needs of newly-served areas, such as Delray Beach.<sup>26</sup> (Brief at 30-31). But this argument is plainly insubstantial. With regard to currentness, an extensive and thorough program

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<sup>26</sup> Appellant implies that there are other newly-served communities (in addition to Delray Beach) which were not included in the program survey (Brief at 31). The record does not support such an implication.



survey had been completed and filed with the Commission only four and one-half months prior to the filing of the instant application. And at no time has appellant advanced facts tending to discredit any substantive conclusion or procedure used in the survey.

With respect to the program needs of newly-served areas, Coral's survey had shown a substantial homogeneity of program needs and interests among the 28 separate communities in which interviews were conducted — a conclusion not challenged by appellant — and its program proposal was shaped to meet the broad spectrum of needs of the entire Miami metropolitan area. In these circumstances, it is ludicrous to suggest that a *Suburban* issue is presented (and a full evidentiary hearing required) solely because interviews were not conducted in a single community of fewer than 21,000 persons (i.e., Delray Beach), comprising less than 1.6 per cent of the population in the station's Grade B contour, particularly when there is not the slightest reason to believe that such community's program needs are in any respect different from those of other nearby communities. See *WYKR, Inc.*, 37 F.C.C. 132, 144, 3 R.R.2d 1, 17 (1964);<sup>27</sup> *United Television Co. of New Hampshire*, 21 R.R. 685, 686 (1961).

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<sup>27</sup> The Commission's Review Board there stated:

[T]he Commission has never held that the *Suburban* case and its policies promulgated thereunder stand for the proposition that a licensee's duty to ascertain and meet the local needs of the principal community to be served is to be extended *in like degree* to all towns and villages within its service area. We do not mean to suggest that an applicant has no programming responsibilities to such towns and villages. There is of course, a duty to provide programming which will accommodate the varied needs and interests of the entire service area. In cases where a new area is contiguous to the area previously served, the Commission assumes that the interests are the same in the absence of an indication of separate and distinct needs. [Emphasis in original; footnote omitted.]



Appellant's apparent position is that *Louisiana Television* requires an evidentiary hearing no matter how insubstantial the asserted *Suburban* question may be. But *Louisiana Television*, as we have already shown (notes 17, 21, pp. 19, 22, *supra*), involved an entirely different factual situation,<sup>28</sup> and appellant's reliance on the broad language of that case in attempting to compel a hearing on an ersatz *Suburban* issue is simply indicative of the manner in which it has utilized administrative and judicial procedures to postpone the advent of a competitive service.

We submit, therefore, that the Commission was not required under Section 309 to hold an evidentiary hearing with respect to any of the issues raised below.

## II

### The Commission Adequately Explained the Reasons for Its Decision and Disposed of All Substantial Issues

The Commission's memorandum opinion (R. 459-69) discusses at some length all of the substantial issues raised below, and reaches clear and explicit conclusions on each issue. Nonetheless, appellant argues that the Commission failed to give "a full, clear and adequate explanation of the reasons for its decision . . . ." (Brief at 13.) Appellant's argument, we submit, either ignores the substance of the Commission's opinion or misconceives the legal standards that such an opinion must meet.

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<sup>28</sup>Wometco Enterprises, Inc. v. FCC, 114 U.S. App. D.C. 261, 314 F.2d 266 (1963), which appellant cites (Brief at 30), is also inapposite. There, although one of the applicants proposed to add 800,000 persons to its service area, there was no finding indicating that the applicant had ever made program surveys in the newly-served area. See *Scripps-Howard Radio, Inc.*, 22 R.R. 1054, 1057 (1962).

Section 309(d)(2) of the Communications Act requires the Commission, in rejecting a petition to deny without a hearing, to "issue a concise statement of all the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition." But it is clear that a "concise statement of reasons" need not take the form of comprehensive findings of fact and conclusions of law. Section 309(d)(2) was added to the Act as part of the 1960 amendments, and the relevant report of the Senate Commerce Committee explained the new provision as follows:

In considering a petition to deny, the Commission should be guided by rules applicable to a motion for summary judgment rather than, as under the present protest procedure, to a demurrer. If, after consideration of the application, the petition and reply, and other matters which it may officially notice, the Commission finds that there are no substantial and material questions of fact and that a grant would be consistent with the public interest, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition. *The Commission would not be required to write an opinion in support of the grant as in a hearing case*, but would be required to dispose of each substantial question presented by the petition, so that the petitioner would have an adequate opportunity to urge error on appellate review.<sup>29</sup>

It is apparent from a reading of the Commission's opinion that it contains considerably more detail than necessary merely to give a "concise statement" of reasons. The opinion states and analyzes the relevant facts and policy considerations and does so, we believe, with sufficient detail and clarity as readily to be understood.<sup>30</sup>

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<sup>29</sup>S. Rep. No. 690, 86th Cong., 1st Sess. at 4 (1959). (Emphasis added.)

<sup>30</sup>See *United States v. Chicago, M., St. P. & P.R.R.*, 294 U.S. 499, 510-11 (1935).

In view of the Commission's careful treatment of the issues, it is difficult to understand the basis for appellant's present claim, and its brief sheds little, if any, light. For example, appellant states that the Commission "completely ignored" Storer's "major" factual allegations regarding "the substantial increase in the number of people within Coral's principal city service area . . . ." (Brief at 17; *see also* 16.) But, as mentioned above (p. 18, *supra*), the Commission appears expressly to have accepted Storer's figures in this regard (*see* R. 461). Appellant also charges that the Commission failed to explain its "reversal" of an alleged earlier determination that a short-spaced facility on Channel 6 "would not be necessary" (Brief at 23). But it is hardly accurate to speak of a "reversal" when the Commission's earlier determination expressly contemplated that a waiver of mileage separation requirements might later have to be granted (*see* p. 3, *supra*). And insofar as appellant contends that the Commission was required to make separate findings regarding every subsidiary factual allegation — for example, appellant's wholly unsupported allegation that Mr. Clyne was "in privity of interest" with other Coral stockholders (Brief at 26-27) — its contention is negated by the language of Section 309(d)(2).<sup>31</sup>

Appellant further urges that the Commission failed to dispose of a "substantial" issue raised by appellant concerning whether Coral may be "relied upon" to construct its station (Brief at 28-29). Appellant advanced no facts respecting the so-called issue but instead merely argued in its petition to deny that the Commission should conclude from documents in its own files that Coral lacks a sincere

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<sup>31</sup> *See* pp. 28-29, *supra*. *Cf.* *Minneapolis & St. Louis Ry. v. United States*, 361 U.S. 173, 193-94 (1959): "By the express terms of § 8(b) [of the Administrative Procedure Act], the Commission [ICC] is not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material'." *See also*, DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 1602 (1958).

intention to build the station (R. 79-88). The documents cited by appellant were principally applications filed by Coral wherein it stated its intention to construct the station as soon as possible but also described the difficulties and delays it had encountered in finding an antenna site that would meet aeronautical standards, comply with local zoning and building laws, and permit adequate television service.

It is readily apparent, we submit, that appellant's argument on this point was a mere makeweight, since appellant (and the Commission) well knew that Coral had no reason whatever deliberately to delay or postpone construction while its sizeable standby expenses were steadily mounting. Not only do the documents relied upon by appellant fail to provide any substantial basis for its contention that Coral does not really intend to build its facility, but in addition the contention is substantially weakened by appellant's own representations to this Court in connection with its petition for stay. Thus, in May 1967, appellant stated to the Court:

. . . appellant has learned that this very day, two weeks after the filing of the stay request, *Coral is continuing construction activities* that it could have ceased once appellant's petition for stay was filed. By constructing its transmitter and building the transmitter access road, as Coral is now doing, intervenor itself is voluntarily incurring construction expenses that could have been delayed until after the stay petition is decided. It is clear, therefore, that appellant cannot be blamed for the construction that Coral has begun.

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By proceeding rapidly to construct its station even after filing of the notice of appeal, Coral assumed the risk of injury should this appeal be decided on the merits adversely to it.<sup>32</sup>

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<sup>32</sup>Reply to Oppositions to Petition for Stay Pendente Lite, 3-4, filed May 5, 1967 (emphasis in original).

Appellant, of course, cannot have it both ways.<sup>33</sup>

In these circumstances it is evident that appellant failed to raise a "substantial" issue which the Commission was required to treat in specific terms in its memorandum opinion and order.<sup>34</sup>

### III

#### The Commission's Decision Is Fully Consistent With Its Prior Decisions

Appellant contends that the Commission erroneously failed to explain the allegedly disparate treatment given Coral's application as compared with others which appellant characterizes as "similar" (Brief at 13). This contention, we submit, is clearly without merit.

In the first place, neither *Miners Broadcasting*<sup>35</sup> nor *Melody Music*,<sup>36</sup> upon which appellant bases its contention, is in point. In the former case, the Commission failed adequately to explain its differing treatment of two competing applicants in the *same* proceeding, and in the latter case, it failed to explain its differing treatment of two licensees implicated in the *same* factual situation. Neither case supports appellant's apparent position that in disposing of petitions

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<sup>33</sup> See also, Opposition of Intervenor Coral Television Corporation to Petition for Stay Pendente Lite, Appendix A, filed May 2, 1967, which provides a detailed account of Coral's construction program.

<sup>34</sup> The Commission did note that, for many years, it has been "keenly conscious" of the problems involved in locating appropriate sites for broadcast towers in the Miami area, thus indicating that it did not agree with appellant's assessment of the problems which have plagued Coral's efforts to provide television service to Miami or Channel 6 (R. 462).

<sup>35</sup> *Miners Broadcasting Serv., Inc. v. FCC*, 121 U.S. App. D.C. 222, 349 F.2d 199 (1965).

<sup>36</sup> *Melody Music, Inc. v. FCC*, 120 U.S. App. D.C. 241, 345 F.2d 730 (1965).

to deny the Commission must in effect catalog every past decision presenting arguably "similar" circumstances and delineate all of the factual distinctions upon which it has relied in reaching various results. Such a rule would, of course, cast an unwarranted burden upon the Commission.

In any event, the Commission's decision in this case is not at all at variance with its prior decisions.

As to the "UHF impact" question, the Commission's decision, as discussed above (p. 19, *supra*), is in full accord with its decision in *Atlantic Telecasting Corp.*, 3 F.C.C. 2d 442, 7 R.R. 2d 297, *aff'd sub nom Lee v. FCC*, 374 F.2d 259 (D.C. Cir. 1967). And, contrary to appellant's claim (Brief at 19-20), *WLCY-TV, Inc.*, 6 F.C.C. 2d 550, 9 R.R. 2d 142 (1967) is not at all apposite. The applicant there proposed to extend city-grade service to 100 per cent of a major city (St. Petersburg) which previously had received no city-grade service from the station and further proposed to extend city-grade service over four other Florida cities to compete for the first time with four local UHF stations assigned or applied for in those communities. *WLCY-TV, Inc.*, 6 F.C.C. 2d 213, 217, 8 R.R. 2d 1333, 1338 (1966). Thus, the threatened impact upon UHF development of *WLCY-TV*'s proposal was clearly of a far greater magnitude than here, where Coral will merely improve its signal in the city it was originally licensed to serve and add only 1.6 per cent to its Grade B population coverage.<sup>37</sup>

Nor does the *WLCY-TV, Inc.* case conflict with the Commission's disposition of the short-spacing issue in this case, as appellant contends (Brief at 23). There, the Commission was asked to

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<sup>37</sup> Appellant also states (p. 23, n. 16), mistakenly, that a "UHF impact" issue was designated for hearing in *Black Hawk Broadcasting Co.*, 4 F.C.C. 2d 283, 8 R.R. 2d 238 (1966) when, in point of fact, the Commission rejected such an issue for reasons very similar to those advanced in its decision here.



reverse a previous order that specifically rejected a short-spaced antenna site, and in its hearing order the Commission concluded that this issue of reversing a specific prior determination was the "basic question" before it.<sup>38</sup> In the instant case, however, there not only was *not* a prior determination but the Commission, in allocating Channel 6 to Miami, expressly foresaw the possibility that it might later have to waive its mileage separation rules (*see* R. 461-62; p. 3, *supra*).<sup>39</sup>

Appellant also argues that the Commission, in determining that Mr. Clyne has not acquired *de facto* control of Coral, erred in failing to distinguish several of its prior decisions.<sup>40</sup> (Brief at 27 & n. 22.) But each of the decisions cited by appellant involved critical facts not present here which indicated that an unapproved transfer of control had in fact occurred. In *WHDH, Inc.*, for example, proxy voting power over 80 per cent of the stock of the corporation had been transferred.

Finally, appellant cites *Black Hawk Broadcasting Co., supra*, and *St. Anthony Television Corp., supra*, in connection with its *Suburban* allegations (Brief at 31). But in the former case, a *Suburban* issue was added because no recent survey was in evidence and two

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<sup>38</sup>WLCY-TV, Inc., 6 F.C.C.2d at 216, 8 R.R.2d at 1337 (1966).

<sup>39</sup>The other Commission cases cited by appellant (p. 23, n. 16) as relevant to the short-spacing question involved completely different factual circumstances. In *Black Hawk Broadcasting Co., supra*, note 37, an alternate antenna site which complied with the separation rules was available to the applicant and, unlike the present case, the status of FAA clearance in the alternate area concerned had not been explored. 4 F.C.C. 2d at 284, 8 R.R. 2d at 242. In the Commission's memorandum opinion in *St. Anthony Television Corp.*, 8 F.C.C. 2d 295, 10 R.R. 2d 38 (1967), the short-spacing issue was expressly held to be moot. *Id.* at 295-96.

<sup>40</sup>*Elyria-Lorain Broadcasting Co.*, 6 R.R.2d 191 (1965); *WHDH, Inc.*, 3 R.R.2d 579 (1964); and *WWIZ, Inc.*, 36 F.C.C. 561, 2 R.R.2d 169 (1964).



major cities had apparently not been surveyed at all. (4 F.C.C. 2d at 285, 8 R.R. 2d at 243.) And in the latter case, no surveys at all were presented with regard to Baton Rouge, the largest community to be served by the applicant. (8 F.C.C. 2d at 298.) In the instant case, by contrast, Coral had recently submitted to the Commission an extensive survey covering the program needs of the entire Miami metropolitan area (*see pp. 25-26, supra*).

Thus, there is no basis for appellant's claim that the decision below conflicted with prior Commission precedent.

#### CONCLUSION

For all of the foregoing reasons, the opinion and order of the Commission should be affirmed.

Respectfully submitted,

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July 17, 1967



## APPENDIX

Section 309 of the Communications Act of 1934, 47 U.S.C.  
§ 309, as amended, (Supp. V, 1964).

§ 309. Application for license.

(a) Considerations in granting application.

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

(b) Time of granting application.

Except as provided in subsection (c) of this section, no such application —

(1) for an instrument of authorization in the case of a station in the broadcasting or common carrier services, or

(2) for an instrument of authorization in the case of a station in any of the following categories:

(A) fixed point-to-point microwave stations (exclusive of control and relay stations used as integral parts of mobile radio systems),

(B) industrial radio positioning stations for which frequencies are assigned on an exclusive basis.

(C) aeronautical en route stations,

(D) aeronautical advisory stations,

(E) airdrome control stations,

(F) aeronautical fixed stations, and

(G) such other stations or classes of stations, not in the broadcasting or common carrier services, as the Commission shall by rule prescribe,

shall be granted by the Commission earlier than thirty days following issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof.

(c) Applications not affected by subsection (b).

Subsection (b) of this section shall not apply —

(1) to any minor amendment of an application to which such subsection is applicable, or

(2) to any application for —

(A) A minor change in the facilities of an authorized station,

(B) consent to any involuntary assignment or transfer under section 310(b) of this title or to an assignment or transfer thereunder which does not involve a substantial change in ownership or control.

(C) a license under section 319(c) of this title or, pending application for or grant of such license, any special or temporary authorization to permit interim operation to facilitate completion of authorized construction or to provide substantially the same service as would be authorized by such license,

(D) extension of time to complete construction of authorized facilities,

(E) an authorization of facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station,

(F) authorizations pursuant to section 325(b) of this title where the programs to be transmitted are special events not of a continuing nature,

(G) a special temporary authorization for nonbroadcast operation not to exceed thirty days where no application for regular operation is contemplated to be filed or pending the filing of an application for such regular operation, or

(H) an authorization under any of the proviso clauses of section 308(a) of this title.

(d) Petition to deny application; time; contents; reply; findings.

(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowl-

edge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e) of this section.

(e) Hearings; intervention; evidence; burden of proof.

If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permit-

ted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

(f) Temporary authorization of emergency operations under subsection (b).

When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring emergency operations in the public interest and that delay in the institution of such emergency operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such emergency operations for a period not exceeding ninety days, and upon making like findings may extend such temporary authorization for one additional period not to exceed ninety days. When any such grant of a temporary authorization is made, the Commission shall give expeditious treatment to any timely filed petition to deny such application and to any petition for rehearing of such grant filed under section 405 of this title.

(g) Classification of applications.

The Commission is authorized to adopt reasonable classifications of applications and amendments in order to effectuate the purpose of this section.

(h) Form and conditions of station licenses.

Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain in addition to other provisions, a statement of the following condi-



tions to which such license shall be subject: (1) the station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; (2) neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter; (3) every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title. (*As amended*, Sept. 13, 1960, Pub. L. 86-752, § 4(a), 74 Stat. 889.)



BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
for the District of Columbia Circuit

No. 20,845

FILED JUL 27 1957

L. B. WILSON, INC.,

Appellant, *Nathan J. Paulson*  
CLERK

v.

FEDERAL COMMUNICATIONS COMMISSION,  
Appellee,

CORAL TELEVISION CORPORATION,  
Intervenor.

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ON APPEAL FROM A MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

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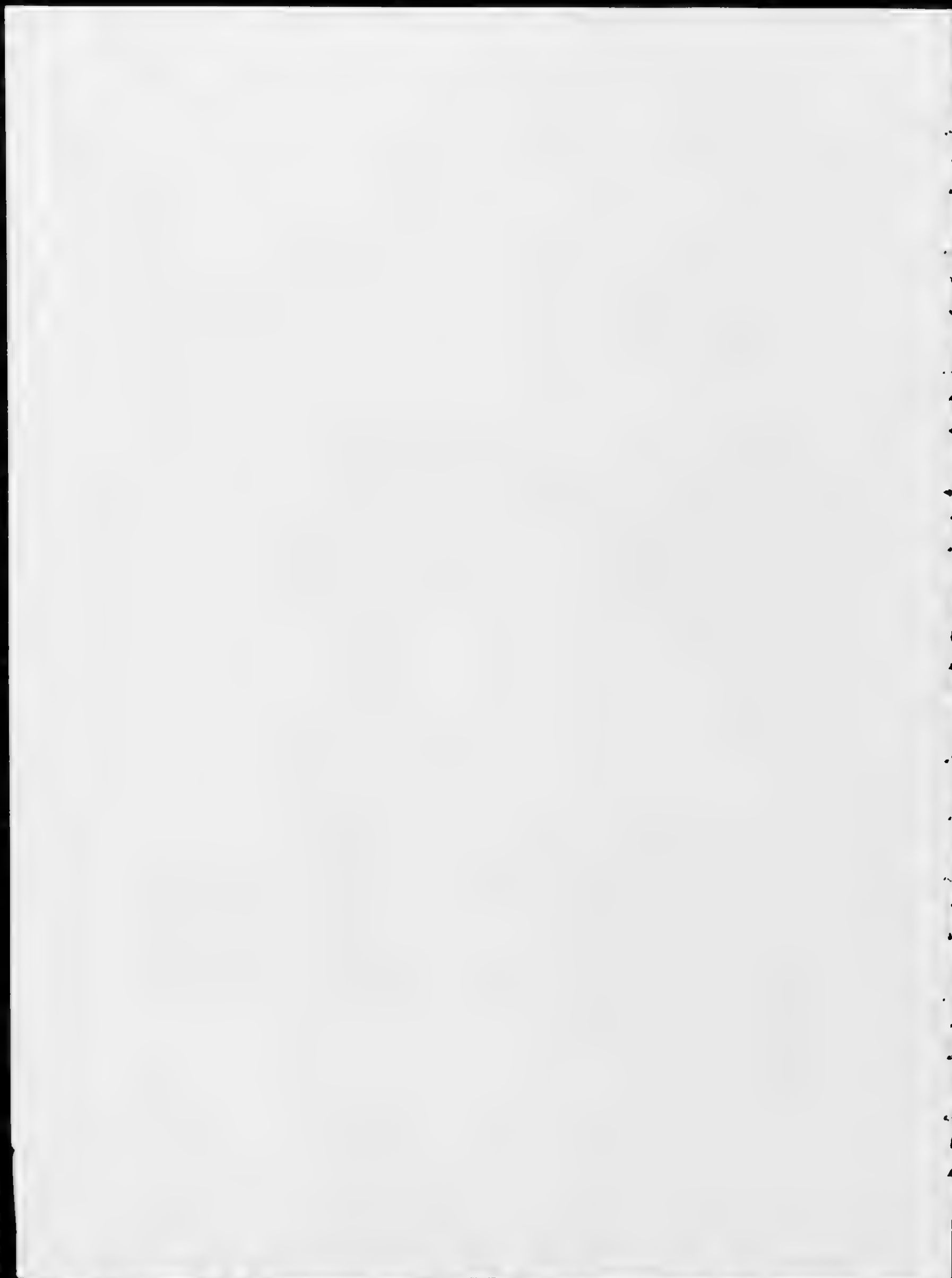
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Washington, D. C. 20554

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STATEMENT OF QUESTIONS PRESENTED

The statement of questions presented as stipulated by counsel and approved by this Court has been set forth on the first page of appellant's brief.

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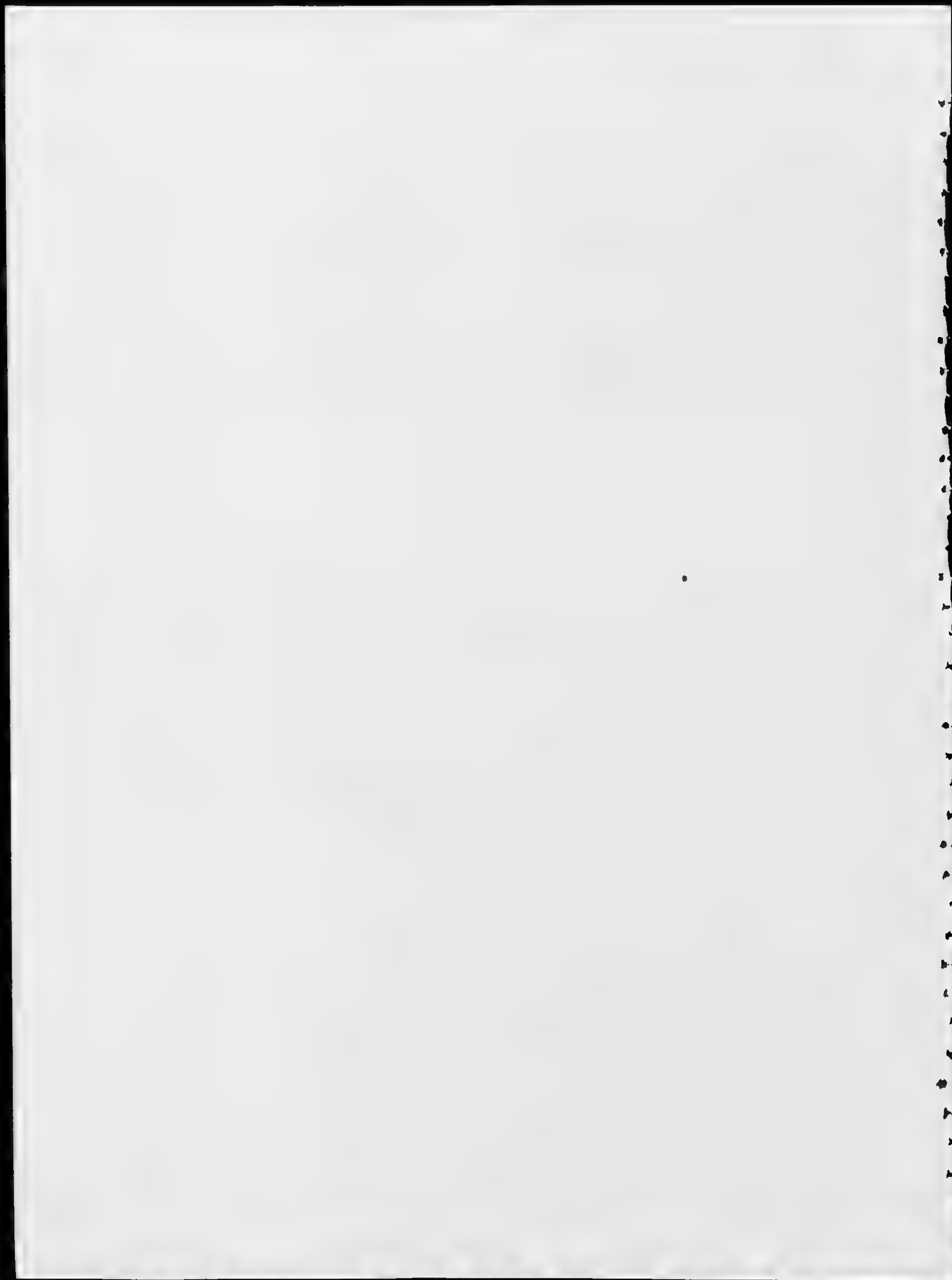
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 20,845

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L. B. WILSON, INC.,  
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,  
Appellee,

CORAL TELEVISION CORPORATION,  
Intervenor.

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ON APPEAL FROM A MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), from a Memorandum Opinion and Order of the Federal Communications Commission released February 15, 1967 (R. 459-469), which granted the application of Coral Television Corporation, permittee of Station WCIX-TV, Channel six, South Miami, Florida, to change its principal community to Miami, move its transmitter site, and make other changes in its facilities. Simultaneously, the Commission denied various pre-grant objections to the application which had been submitted by the appellant and others.

Because appellant's statement of the case is incomplete, it is felt the Court would be assisted by a more detailed recital of the facts.

Coral filed its present application on March 15, 1966. (R. 1-53, 275-295, 424-458). At that time it was the permittee of Station WCIX-TV, Channel six, South Miami, Florida. Channel six was originally allocated by the Commission to Miami proper in 1957, Miami Drop-In Case, 15 Pike & Fischer, R.R. 1638a. Coral applied for the channel in 1958, but specified South Miami as the city to be served.<sup>1/</sup> This was necessitated by the fact that Coral could not secure a transmitter site which would permit it to serve Miami adequately under the Commission's rules regarding the signal strength required in the city to be served.<sup>2/</sup> This application was granted in 1964, following a comparative hearing with other applicants.<sup>3/</sup> Subsequently, Coral requested a number of

<sup>1/</sup> Section 73.607(b) of the Rules, 47 CFR section 73.607(b) permits an applicant to specify any community unlisted in the table of assignments which is within 15 miles of a listed city to which the requested channel is assigned.

<sup>2/</sup> Section 73.685(a), 47 CFR section 73.685(a) requires certain minimum field intensity for signals in the principle city to be served.

<sup>3/</sup> The prior proceedings are discussed in Publix Television Corp., 36 F.C.C. 1215, 2 Pike & Fischer, R.R. 2d 481 (1964), and may be summarized as follows: The Initial Decision in the comparative proceeding, issued in 1960, considered three applicants and awarded the channel to South Florida Amusement Co., Inc. Prior to a final decision by the Commission, the case was remanded for a determination of the character qualifications of a principal in South Florida. Publix Television, the third applicant, did not appeal the Initial Decision and participated no further in any way. While this character issue was being considered, South Florida and Coral entered into an agreement of dismissal. After intermediate procedural steps, the agreement of dismissal was approved, and the Coral application granted.

modifications in the construction permit, as well as extensions of time within which to complete construction of the station. These delays and modifications were occasioned by Coral's continuing effort to secure the most desirable antenna site which would comply with both the Commission's technical requirements and with the Federal Aviation Authority's aeronautical hazard rules (R. 198-204). In March of 1966 Coral received permission to locate its main studio in the city of Miami, although South Miami continued to be the principle city to be served.<sup>4/</sup> Coral's authorization, as modified, would at that time have permitted service to approximately 90% of Miami with the required signal strength.

As the holder of a construction permit for Channel six, in South Miami, Coral's application was in the form of a proposed modification of construction permit. The application would (1) change the designated city to Miami, and (2) move the transmitter to a more favorable location which would permit Coral to place the required city grade signal over approximately 99% of the city of Miami, and improve signal strength and coverage.

This application was accompanied by a request for waiver of two of the Commission's technical rules. The proposed transmitter site was short spaced to a co-channel station by approximately

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<sup>4/</sup> See Section 73.613(b) of the Rules, 47 CFR section 73.613(b).

5 miles,<sup>5/</sup> and the principle city contour failed to cover the entire land area of Miami (99.89% would be covered).<sup>6/</sup>

Petitions to deny were filed by appellant L. B. Wilson, licensee of one of Miami's three operating VHF stations (R. 67-89) and by Storer Broadcasting Company, permittee of WGBS-TV, Channel 23 in Miami (R. 483-497).<sup>7/</sup> Objections were raised to grant of the Coral application on the following grounds: (1) Coral's proposal would have an adverse impact on UHF development in the Miami area; (2) An unauthorized transfer of control of Coral had occurred; (3) Coral was financially unqualified under the Commission's standards; (4) Coral had failed to adequately assess the needs and interests of the audience within its proposed Grade B contour; (5) Coral's past history shows that it cannot be relied upon to construct according to promise; and (6) The short spacing between Coral and the co-channel station in Orlando was not in the public interest.

<sup>5/</sup> Section 73.610(b)(1) of the Rules, 47 CFR section 73.610(b)(1) requires a minimum distance from a co-channel station of 220 miles. The Coral site would be 4.7 miles short of this requirement. Under an application for move in transmitter site filed by the co-channel station involved in this short spacing, WDBO-TV, Channel 6, Orlando, Florida, the distance would be 6.1 miles short of the required 220. However, both stations agreed to this situation, and are committed to provide each other with equivalent technical protection.

<sup>6/</sup> Section 73.685(a), supra, note 2.

<sup>7/</sup> Scripps-Howard Broadcasting Co. also filed a petition to deny which was subsequently withdrawn. (R. 60-66 375). Informal objections were also submitted by the Association of Maximum Service Telecasters, Inc. (R. 103-140).



A succession of pleadings dealing with these issues were filed by the parties, and Coral amended its application to supply further information (R. 275-295, 424-458).

The Commission carefully considered these matters and concluded that no substantial or material questions of fact had been raised, and that a hearing was not warranted (R. 459-469). The Commission also held that good cause had been shown for the waivers requested by Coral, and accordingly found that a grant of the application would serve the public interest.

In the interest of clarity, the various issues raised by the petitions to deny, and the Commission's treatment thereof, will be discussed seriatim:

A. UHF Impact

Appellant and Storer among others, alleged that Coral's proposal would adversely affect the development of UHF television broadcasting in the Miami area by creating additional competitive pressures, particularly referring to the previous operation of channel 23 in Miami by Storer. This facility had been operated in the years 1954-7, but had been discontinued after heavy financial losses (R. 485). In its petition to deny Storer alleged (R. 483-491) that its current plans to renew operations on channel 23 would be dropped if the Coral application were to be granted.

The Commission noted that the pleadings of Storer and appellant failed to raise a substantial and material question of

fact concerning the impact of the improved Coral operations on UHF broadcasting, and observed:

Under Coral's present authorization, its principal city contour includes nearly all of Miami and its predicted Grade A contour covers the remainder; its authorized Grade B contour extends substantially farther north into the densely populated coastal region. The proposed Grade B contour, however, would include less than an additional 21,000 persons (an increase of 1.6% in the population presently within the authorized Grade B contour). Thus, there would be a relatively insignificant increase in the number of persons within the Grade B contour. Moreover, Miami is within the principal city contours of the following Miami television broadcast stations: WTVJ (CBS), Channel 4; WCKT (NBC), Channel 7; WLBW-TV (ABC), Channel 10; WGBS-TV Channel 23 (not in operation); and WTMJ, Channel 39 (not yet built). In addition, Miami is within the predicted Grade B contours of West Palm Beach, Florida, television stations WPTV (NBC), Channel 5, and WEAT-TV (ABC), Channel 12. In these circumstances, we are asked to conclude that the improvement in signal strength which Coral proposes would make the difference in whether UHF television broadcasting could succeed in Miami. \* \* \* There is, however, a part of the gain area to the north along the coastal region, which includes the community of Delray Beach, Florida. This is where the bulk of the 21,000 persons who would receive WCIX-TV's signal for the first time reside. This area is also within the predicted Grade B contour of Station WGBS-TV and is the only area where the two stations would be in competition for the first time. Otherwise, the only effect of Coral's proposal would be a general improvement of signal strength throughout its authorized Grade B area. \* \* \* Storer has not shown that, of well over 1,000,000 persons in the Greater Miami area, coverage by Coral of an additional 21,000 for the first time would be of any significance. Storer has not addressed itself specifically to the question of how the proposed improvement of signal strength would adversely affect UHF development and success in Miami, whereas operation by Coral as presently authorized would not. Storer's failure to make specific allegations of fact on this point is, we think, fatal to its contentions of adverse impact on UHF broadcasting. (R. 462-463).

Citing Jackson F. Lee v. Federal Communications Commission, \_\_\_ U.S. App. D.C. \_\_\_, 374 F.2d 259 (1967), in which this Court approved a similar holding, the Commission concluded by noting that its policy of fostering UHF broadcasting did not require that all VHF stations be "frozen" at their present level of technical operation. Requests by VHF stations to improve their facilities are to be expected from time to time, the Commission stated, and where competing UHF's seek to block it they must be prepared to show with some degree of specificity that the improvement in service will be offset by other public interest factors.

B. Short Spacing

Appellant also attacked the Coral proposal to situate its antenna some 6 miles closer to another station on channel six than was permitted by the rules. In disposing of this issue the Commission noted that when channel six had been assigned to Miami originally it was contemplated that the site would have to be approximately where Coral proposed to operate in the instant application.<sup>8/</sup> The Commission also noted that Coral's existing authorization permitted Coral to operate its main studios in Miami proper, and enabled it to provide a principal city signal to 90% of the city of Miami. The Commission said:

Realistically, the station is, except nominally, already a Miami station, as it was intended to be.

<sup>8/</sup> However, it was not until February 18, 1966, that FAA approval for this area was obtained (R. 221).

No person who would be within the presently authorized Grade B contour of the station will be deprived of that service, but a stronger signal will be provided to more than 127,000 persons within the proposed Grade A contour and 256,000 persons within the proposed principal city contour. (R. 461).

The Commission also noted that in the Miami Drop-In Case, 15 Pike & Fischer, R.R. 1638a, reconsideration denied, 15 Pike & Fischer, R.R. 1642a (1958) and the Second Report on Deintermixture, 13 Pike & Fischer, R.R. 1571 (1956), it had indicated that:

[I]n an appropriate adjudicatory proceeding, we might consider waiving the spacing rules if it is determined that adequate coverage of Miami could not be provided from sites south of Miami which are both consistent with the rules and do not involve untoward hazards to air navigation. Coral has shown that it could not locate such a site, since a site southward would encounter serious aeronautical objections. (R. 461)

After noting that Coral's showing adequately documented its inability to find a more desirable site than that proposed, the Commission concluded that the waivers should be granted:

The Commission has, for many years, been keenly conscious of the problems involved in locating appropriate sites for broadcast towers in the Miami area. We think that the proposal before us represents the best opportunity to provide Miami with a fourth competitive VHF television service with a reasonable assurance of economic viability and deference to air safety considerations. On balance, it seems clear that those detriments flowing from operation in derogation of our rules to the extent here involved are far outweighed by the public interest considerations inherent in the early inauguration of another VHF television service to Miami and greater service to more persons with no loss to any. (R. 462)

C. Transfer of Control

In its petition to deny, appellant alleged that a transfer of control of the applicant corporation had occurred without consent of the Commission, contrary to section 310(b) of the Act, 47 U.S.C. section 310(b). The Commission considered in great detail the allegations. Its discussion may be summarized as follows: In May of 1964, 100 shares of the 500 authorized had been issued, and were held by 10 stockholders in varying amounts. In October of 1965, all 500 shares had been issued. 47% was owned by nine of the original 10 shareholders, and the remaining 53% was held by nine new stockholders, one of whom, C. Terence Clyne, voted 40% pursuant to a Stock Purchase Agreement filed by Coral with the Commission. At this point the original stockholders held legal title to 47% of the stock, but two of them continued to vote stock held by family members, thus giving the original owners voting control of 54% of the stock. (R. 464-465).

An ownership report filed as November, 1965, revealed further changes. Primarily, these consisted of stock distributions by two of the original owners to their families. At that point, the original stockholders held legal title to 43.4% of the stock, but voted 50.4%. With these facts as background, the Commission said:

We consider first whether there has been a transfer of de facto control to C. Terence Clyne. On October 14, 1965, a Stock Purchase Agreement was executed which,

inter alia: (1) gave Clyne 200 shares of stock (40%), making him the largest single stockholder, the next highest being 6%; (2) made Clyne Executive Director; (3) gave Clyne the right to select three of the seven members of the Board of Directors; and (4) provided that the station could not be sold without an affirmative vote of 65% of the stock. Clyne was the only stockholder owning more than 35% of the stock and he alone could, therefore, have "blocked" sale of the station. One month later (November 18, 1965), Clyne was also made Chairman of the Board. On March 30, 1966, Clyne transferred 25 shares (5%) of his stock to Hy Gardner, . . . . On October 14, 1965, the date of the Stock Purchase Agreement and Clyne's acquisition of 40% of the stock, Clyne, Gardner, and Harold Strauss (a non-stockholder) were elected to the Board of Directors. These three constituted Clyne's appointees. Under the terms of the Stock Purchase Agreement, Clyne was required to obtain for the corporation a bank loan of \$600,000 as a condition precedent--a condition which he has met. The Agreement also provided for resignation of all existing directors and the election of [others] as Directors and the selection of Clyne as Executive Director. (R. 466)

The Commission concluded that:

Clyne exercises no prerogatives or powers which are inconsistent with his position as the largest single stockholder. Without the vote of stock owned by someone else, he cannot block sale of the station; he and his appointees own less than a majority of the stock and they cannot, by vote of their stock, control the corporation. Clyne cannot designate the majority of the Board of Directors and, lacking numerical superiority on the Board, they cannot control the Board of Directors or corporate policies. Finally, we note that Clyne has not furnished the loan of \$600,000 to Coral, but has merely obtained such a loan for the corporation; thus, he is not in the position of one who can control the corporation by virtue of his control of its finances. Cf. Radio Associates, Inc., FCC 62-51, 32 FCC 166, 21 RR 368. We conclude, therefore, that there has been no transfer of de facto control of the corporation. (R. 466-467)9/

9/ This Radio Associates opinion is in response to a remand of this Court ordered in WLOX Broadcasting Co. v. Federal Communications Commission, 104 U.S. App. D.C. 194, 260 F.2d 712 (1958), discussed infra at p. 37.



The Commission also considered whether there had been a transfer of de jure control. It concluded that a technical transfer of control had occurred, necessitating Commission approval, and noted:

It is clear that Coral made no attempt to conceal or misrepresent the facts with respect to control of the Corporation, and we believe that the circumstances were such that reasonable men could differ as to whether there was a transfer of control. Coral's failure to file an application for our consent to the transfer of control was an excusable one and Coral should not be penalized for an honest error in judgment. (R. 467)

Coral was, however, directed to file an application for transfer of control.<sup>10/</sup>

D. Adequacy of Program Survey

Appellant alleged that Coral had not demonstrated compliance with the Commission's requirements respecting a program survey of the service area's needs and interests. See Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), cert. denied, 371 U.S. 821 (1963). The Commission found no merit to this contention, observing that when Coral won its initial construction permit after a comparative proceeding, it had met the survey requirements, and added:

In its earlier application . . . for modification of its construction permit which was granted on December 14,

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<sup>10/</sup> This application was subsequently filed and approved by the Commission on March 31, 1967, F.C.C. Report No. 6404.



1965, Coral submitted a 35-page survey report setting forth its efforts to ascertain the programming tastes, needs, and interests of the Greater Miami area. It has always maintained that it was a Miami station and states that it has, for this reason, formulated its programming proposal to be responsive to the needs of the entire Miami area. This is a rational and reasonable approach, and in view of the submission of the extensive survey report, we are satisfied [Coral has met our standards]. (R. 463-4)

Finally, the Commission found that no substantial and material questions of fact had been raised, and that a grant of <sup>11/</sup>the Coral application would serve the public interest.

On April 21, 1967, appellant petitioned this Court for a stay pendente lite, of this grant. By order of May 25, 1967, the petition was denied.

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<sup>11/</sup> In its Memorandum Opinion and Order the Commission also considered the question of Coral's financial qualifications and found them to be adequate. Inasmuch as appellant has not briefed that issue appellee assumes it has been abandoned, and will not address itself to the question. The Commission also specifically found the requested waiver of the coverage rule, (n. 2 supra, p. 2) to be in the public interest. Appellant has not contested this finding.

SUMMARY OF ARGUMENT

The Commission acted well within its discretion in holding that no substantial and material questions of fact existed, and that a grant of the Coral application would serve the public interest. All of its determinations were adequately explained. Appellant has failed to show an abuse of discretion, inconsistency with prior practice, or a violation of section 309(d) of the Act, 47 U.S.C. 309(d).

The Commission correctly held that a grant of the Coral application would have no adverse impact on UHF television in the Miami area. The only effect the Coral application would have on the existing and potential UHF stations would be to increase the signal strength and slightly extend the contours of one of four VHF stations in the Miami market. At the time the Coral application was pending there existed in Miami two UHF permittees, Storer Broadcasting Co., and another. The latter interposed no objections whatsoever, and Storer's petition to deny did not attempt to show how in a market of more than 1,000,000 population, the increase in Coral service to 21,000 people residing in Storer's predicted grade B contour, nor how the general improvement in Coral's signal, would be decisive factors in the success of UHF broadcasting in Miami. In any event, Storer's contention that channel 23 would not return to the air if the Coral application were granted, is without merit by virtue of a subsequent agreement for sale and reactivation of the facility.

Similarly, the Commission properly found that waiver of its spacing requirements would serve the public interest. In the Miami Drop-In Case, 15 Pike & Fischer, R.R. 1638a (1957), reconsideration denied, 15 Pike & Fischer, R.R. 1642a (1958), in which channel six was allocated to Miami, the Commission specifically noted that waiver of the spacing requirements might be appropriate, and would be considered on the merits in an individual adjudicatory proceeding. In support of its request for waiver, Coral demonstrated that while the proposed site involved only a small violation of the rules (approximately 5 miles short of the 220 required), it was in one of two areas suitable for service to Miami specifically selected by the FAA for broadcast towers. The co-channel station to which Coral would be short-spaced had consented, and Coral and the other station have agreed to provide each other with "equivalent protection." The Commission's decision to waive the mileage rule was based on its finding that the move in transmitter site would bring an improved television signal to hundreds of thousands of Miami area residents, while depriving no one of the service already authorized. In view of the long standing uncertainty as to the ability of any licensee on channel six to adequately serve the city of Miami from a properly spaced transmitter, good cause existed for a waiver.

The Commission carefully considered the allegation that de facto transfer of control of Coral had taken place, and properly rejected the charge. Although C. Terence Clyne had

acquired a substantial interest in the corporation subsequent to the original grant, is the largest single stockholder, chairman of the board, and exercises certain executive functions, he and his appointees own less than 50% of the stock. He is unable to control a majority of the board, cannot control the corporation's finances, and has done nothing to indicate dominance over the corporation's affairs. There is, moreover, no indication whatever in any of the Clyne transactions of either a motive or an intent to circumvent the processes of the Commission.

There was no need to hold a hearing on the question whether Coral had adequately surveyed its service area. In 1965 Coral had taken an extensive survey of 28 communities in the greater Miami area, to determine the local programming needs and interests. This survey was area-wide in line with Coral's intent to serve the entire Miami area. The fact that the later request for modification would bring an additional 21,000 people within the grade B contour, out of a greater Miami population of approximately 1,000,000, does not undercut the sufficiency of the survey. The Commission does not require that each separate community in a large metropolitan area must be independently surveyed.

Finally, there was no need to deal with the question of Coral's construction activities. Appellant totally failed to raise a contested question of fact before the agency as to the likelihood that Coral would build the requested facility. Moreover, as a practical matter the issue is substantially moot since construction has begun and is progressing rapidly.

ARGUMENT

- I. THE COMMISSION WAS CLEARLY CORRECT IN CONCLUDING THAT NO SUBSTANTIAL OR MATERIAL QUESTIONS OF FACT HAD BEEN RAISED, AND THAT A GRANT OF THE CORAL APPLICATION WOULD SERVE THE PUBLIC INTEREST.

Appellant argues that the Commission's grant of the Coral application for modification of its construction permit without a hearing was contrary to the provisions of Section 309 of the Communications Act, 47 U.S.C. 309. That section provides for grants without hearing where the Commission finds, after consideration of the application and all relevant pleadings, that there are no substantial and material questions of fact outstanding and that a grant is in the public interest. The statute provides that where a petition to deny is filed, it must "contain specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with" the public interest. 47 U.S.C. 309(d)(1). But where the Commission finds that this showing has not been made, the petition to deny may be disposed of by "a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition." 47 U.S.C. 309(d)(2).

In amending the statute in 1960, it was the intent of Congress that petitions to deny filed under the new Section 309(d) should make:

a substantially stronger showing of greater probative value than is now necessary in the case of a post grant protest. The allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by general affidavits, as

is now possible with protests, are not sufficient. <sup>12/</sup>  
S. Rept. No. 690, 86th Cong., 1st. Sess., p. 3

Under the new law, the Commission was to be "guided by rules applicable to a motion for summary judgment rather than, as under the present procedure, to a demurrer." S. Rept. No. 690, 86th Cong., 1st Sess., p. 4.

Thus, Section 309(d), both by its terms and in light of the legislative history, reflects an intention by Congress that a hearing not be required in the absence of substantial factual allegations which, if true, establish a prima facie case for denial. In other words, where the material facts are not controverted and in the absence of unresolved legal or policy questions, no hearing is required. See Jackson F. Lee v. Federal Communications Commission, \_\_ U.S. App. D.C. \_\_, 374 F.2d 259 (1967); National Broadcasting Co. v. Federal Communications Commission, 124 U.S. App. D.C. 116, 362 F.2d 946 (1966);

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<sup>12/</sup> The post-grant protest referred to was that provided for in the then Section 309(c), which gave the Commission little discretion. See Federal Broadcasting System, Inc. v. Federal Communications Commission, 96 U.S. App. D.C. 260, 263, 225 F.2d 560, 563, cert. denied 350 U.S. 923 (1955), holding that what was required of a protest under section 309(c) was "merely an articulated statement of some fact or situation which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience, and necessity, . . . ."

American Federation of Musicians v. Federal Communications Commission, 123 U.S. App. D.C. 74, 356 F.2d 827 (1966); Capitol Broadcasting Co. v. Federal Communications Commission, 116 U.S. App. D.C. 370, 324 F.2d 402 (1963).

A grant of the Coral application fulfills a long standing allocations objective of the Commission by bringing a fourth VHF channel to Miami. Thus in 1957 in the Miami Drop-In Case, 15 Pike & Fischer, R.R. 1638a, the Commission stated:

It is our judgment, therefore, that the allocation of Channel six to Miami would serve the public interest by creating improved opportunities for comparable and effective competition and insuring the likelihood of more and better television service and more local television outlets in the Miami area. (Id. at 1642)

Coral applied for the channel, and after a protracted comparative proceeding, was granted a construction permit in 1964. Although Coral had to specify South Miami as its principal city because of antenna site difficulties, there has never been any question that Coral proposed to serve the entire Miami area. Publix Television Corp., 36 F.C.C. 1215, 2 Pike & Fischer, R.R. 2d 481 (1964). And, as noted above, this was the Commission's purpose in making the channel six allocation.

The instant application to modify its construction permit was filed by Coral in an effort to improve its service in the Miami area through the use of a superior antenna site. The new site will permit greater coverage of the city of Miami, and will bring improved service to hundreds of thousands of people without any loss of previously authorized service.



Appellant contends that the Commission erred in granting the application without holding an evidentiary hearing on the following issues: (1) whether Coral's application would have an adverse impact on the growth and development of UHF broadcasting in Miami; (2) whether a waiver of the short spacing rules would be in the public interest; (3) whether a transfer of control of Coral had occurred without prior Commission consent; (4) whether Coral had adequately surveyed the needs and interests of its service area; and (5) whether Coral's construction promises can be relied on.

We will discuss these matters seriatim, showing that in each instance appellant's claims lack substance and that the Commission's disposition of the matters raised comports fully with the requirements of Section 309(d).

A. The Change In Facilities Proposed By Coral Will Have No Significant Effect On The Development Of UHF Broadcasting In Miami.

As part of its policy of fostering UHF broadcasting, the Commission has held it contrary to the public interest for VHF stations to improve their facilities where it appears likely that a significant adverse effect on the competitive position of UHF stations in the area would result. See, e.g., Triangle Publications, Inc., 3 Pike & Fischer, R.R. 2d 37 (1964); Cf. WHAS, Inc., 8 Pike & Fischer, R.R. 475 (1966). The Commission's opinion in this case carefully and extensively considered the

question of UHF impact, but concluded that the facts presented were not sufficient to warrant an evidentiary hearing on the question. Appellant, a well-established VHF station, disputes this conclusion (Br. 15-20).

The question of UHF impact was raised before the Commission primarily by the Storer Broadcasting Co., Inc., permittee of a UHF station on channel 23. In its petition to deny (R. 483-496), Storer observed that it had previously operated the station during the period 1954-1957 at a substantial loss. Since that time the station has remained off the air. Storer alleged that its recent plans to reactivate channel 23 would be abandoned if the Coral's application were granted because of the competitive effect the Coral signal would have on the prospects for success of the UHF station. (R. 487-489).

As currently authorized, Coral's principal city contour includes nearly all of Miami and its grade A contour covers the remainder. The proposed grade B contour would add only 21,000 people to those who reside within the present grade B contour, an increase of but 1.6%. The Miami area is within the principal city contours of three VHF stations as well as two UHF stations not currently operating,<sup>13/</sup> and is within the grade B

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<sup>13/</sup> On February 15, 1967, the release date of the Memorandum Opinion and Order in question here, two UHF stations were authorized in Miami: channel 23, assigned to Storer, and Channel 39 for which a construction permit had been granted but which was not yet in operation. Subsequently, on March 17, 1967, a third construction permit for a UHF station on channel 33 was granted.

contour of two VHF West Palm Beach stations. After noting these considerations, the Commission concluded:

Storer has not shown that, of well over 1,000,000 persons in the Greater Miami area, coverage by Coral of an additional 21,000 for the first time would be of any significance. Storer has not addressed itself specifically to the question of how the proposed improvement of signal strength would adversely affect UHF development and success in Miami, whereas operation by Coral as presently authorized would not. Storer's failure to make specific allegations of fact on this point is, we think, fatal to its contentions of adverse impact on UHF broadcasting. (R. 463).

In light of the very slight improvements in Coral's facilities and the absence of countervailing data concerning competitive injury, this conclusion is clearly a reasonable one. It is, moreover, in full accord with Jackson F. Lee v. Federal Communications Commission, \_\_ U.S. App. D.C. \_\_, 374 F.2d 259 (1967), a recent case in which this Court noted that the Commission's concern for UHF growth does not compel a hearing on every application opposed by a UHF station. In Lee, a VHF station assigned to Wilmington, North Carolina, proposed to modify its authorization so as to improve service over a wide area, including Fayetteville, North Carolina. Lee, an applicant for a UHF station in that city, objected to the improvement in signal strength of the VHF station, enumerating a number of ways in which the proposed improvement in the service would lead to keener competition in Fayetteville, and alleging that in view of the Commission's concern with the development of UHF, a hearing should be held on the application of the VHF.

The Commission, however, concluded that the UHF applicant's showing was inadequate to merit a hearing. Atlantic Telecasting Corp., 3 F.C.C. 2d 442, 7 Pike & Fischer, R.R. 2d 297 (1966).

This Court affirmed, saying in part:

The Commission concluded, also, that the stronger signals which the proposed operation of WECT would provide to Fayetteville had not been shown by Lee to be a factor which would imperil the ability of a UHF television station in Fayetteville to compete successfully. Here too we are not convinced otherwise. As the Commission pointed out,

Cumberland filed its application with the knowledge that it would have to compete with a multiplicity of VHF television services within its own proposed Grade B contour . . . . If Cumberland based its proposal on the present status of competition, the only element which would be different would be the increase in strength of the WECT signal to Fayetteville. Yet this is a question with which Lee has not attempted to deal.

Jackson F. Lee v. Federal Communications Commission, 374 F.2d at 259.

We submit the Lee case is directly in point, and dispositive of the present case. In fact, this case is a fortiori since the grade B population increase in Lee was 105%, whereas here it is a mere 1.6%. See Atlantic Telecasting Corp., supra, 3 F.C.C. 2d, at 444, 7 Pike & Fischer, R.R. 2d at 300.

Appellant argues that in the Lee case the relevant signal strength increase of the VHF station occurred at the fringes of its service area, whereas here the relevant area is in the heart of the VHF's service area. In both cases,

however, the crucial factor was the claim of the UHF that it would be injured by the increase in a VHF station's signal within the heart of the UHF service area. Nor is there merit to the contention that Coral's application requires waiver of two Commission rules whereas the application granted without hearing in the Lee case did not. The waivers involved in the Coral application are minor in nature<sup>14/</sup> and are in any event wholly unrelated to the UHF impact question.

While appellant argues (Br. p. 19) that Storer's allegations were more specific than those of the UHF applicant in the Lee case, it has made no effort to substantiate its argument. The fact is that Storer's allegations contained no specifics whatsoever and advanced nothing more than the bare claim that competitive injury would force Storer to abandon its plans for reactivating channel 23. Subsequent developments, moreover, have entirely removed whatever weight might otherwise have been accorded this assertion. Appendix A hereto

<sup>14/</sup> Section 73.685(a), 47 CFR 73.685(a), requires the city grade contour to cover the entire city. Coral's city grade contour would reach 99.89% of the entire land area of Miami. Section 73.610(b)(1) of the Rules, 47 CFR section 74.610(b)(1), requires a minimum distance from a co-channel station of 220 miles. The Coral site would be 4.7 miles short to the presently authorized co-channel station and would be 6.1 miles short under a modification proposal filed by the co-channel station. The Commission granted a waiver of each of these requirements.

contains an excerpt from testimony of John McCoy, a vice-president of Storer Broadcasting Corp., stating unequivocally that Storer had no intention to activate channel 23 and was endeavoring to dispose of it. This testimony was given in December of 1966, prior to the grant of the Coral application. And on June 30, 1967, Storer filed with the Commission an application looking toward assignment of the WGBS-TV license to an entity committed to placing the station back in service. As part of the sale contract, Storer has agreed to continue its reactivation activities at the station. Accordingly, it appears that WGBS will in the near future return to the air, notwithstanding the Coral grant.

Finally, appellant argues (Br., pp.19-20) that the decision to grant the Coral application is inconsistent with a prior Commission decision in WLCY-TV, Inc., 6 F.C.C. 2d 213, 8 Pike & Fischer, R.R. 2d 1333 (1966) reconsideration denied 6 F.C.C. 2d 550, 9 Pike & Fischer, R.R. 2d 142. That decision, however, is readily distinguishable from the present one. In WLCY-TV, Inc., the proposal would for the first time completely cover four cities with a city-grade signal as well as bringing a new grade B signal to 416,000 people. In addition, one UHF licensee and two applicants for UHF stations in the WLCY case requested a hearing on the impact question. The operating UHF stated that it had recently lost its network affiliation to

WLCY, and had since become a financially marginal operation at best. Here, on the other hand, the new service is de minimis and only Storer claimed that it would be injured. As we have shown above, this claim was not pursued, and is mooted by the assignment application referred to above.

Accordingly, appellant's assertion that the Commission has applied different standards to the WLCY, Inc. case and to the present one is without merit.<sup>15/</sup> Each case is judged on its own facts and the Commission's adherence to the standard and rationale approved by this Court in Jackson F. Lee v. Federal Communications Commission was clearly reasonable.

<sup>15/</sup> In fact the Commission's treatment of the UHF impact question was entirely consistent with its decisions in prior cases. Where the Commission has set the UHF impact question for hearing, special facts have been present. Thus, the incursion of a new grade A VHF signal which the operating UHF's claim will threaten their network affiliation merits a hearing. Selma Television, Inc., 4 Pike & Fischer, R.R. 2d 714 (1965). Similarly, where an operating UHF which is the only station assigned to a city is already competing with seven VHF signals, a proposed increase in three of these signals requires a hearing. KTIV Television Co., 2 Pike & Fischer, R.R. 2d 95 (1964). And where the ability of an authorized UHF station to complete construction and begin operation might be adversely affected by the incursion of a new principal city signal, a hearing has been held. Central Coast Television, 6 Pike & Fischer, R.R. 2d 719 (1966). But in Blackhawk Broadcasting Co., 4 F.C.C. 2d 282, 8 Pike & Fischer, R.R. 2d 238 (1966) erroneously cited by appellant (Br., p. 23) as a case in which a UHF impact question was set for hearing, the Commission refused to hold a hearing on the UHF impact question where the applicant sought to move its transmitter site into an area with four authorized, but no operating UHF stations. In Blackhawk, the Commission noted that each of the two cities in question was served by three network affiliated stations. Similarly, in Miami, there are currently three network affiliated stations.



In sum, it was incumbent on the appellant (or Storer) to show that the improvement in the Coral signal, and the increase in the population served by both Storer and Coral of some 21,000 out of a metropolitan population of approximately 1,000,000 already being served by three network affiliated VHF stations, would be the factor leading to adverse impact on UHF broadcasting. This Storer failed completely to accomplish, and significantly, the remaining UHF permittee and applicant in Miami did not file any pleadings at all. As the Commission noted, the mere presence of both VHF and UHF facilities in the same area does not operate automatically to require a hearing on UHF impact every time a VHF station applies for a change or improvement in its facilities. Under the circumstances, it is clear appellant has failed to raise a substantial and material question of fact on the UHF impact issue.

B. The Commission's Waiver Of Its Short Spacing Rule Was An Action Well Within Its Discretion.

Appellant contends (Br. pp. 20-24) that the Commission erred in waiving its rules without a hearing to permit Coral to operate from a short-spaced site, and did not adequately justify its conclusion that a hearing was not necessary to determine whether the public interest would be served by such a move.

The Commission's decision on this issue, however, was well within its discretion. First of all, as the decision notes, Channel six was allocated to Miami to provide a fourth competitive

VHF service. Although Coral was technically assigned to South Miami, this was because from its original transmitter site the station could not provide a signal of sufficient strength over Miami to qualify under the Commission's rules as a Miami station. The Commission had previously permitted Coral to operate its studios in Miami proper, and from its original facilities it could place a principal city signal over 90% of Miami. Thus for all intents and purposes the facility was a Miami station already. The waiver of the mileage spacing rule simply allowed for the selection of a transmitter site that would be more appropriate for such a station and would at the same time meet Federal Aviation Agency requirements. A stronger signal would also be provided to more than 127,000 within the proposed grade <sup>16/</sup> A contour, and 256,000 within the principal city contour. The short spacing in this case is of a minor nature and has been agreed to by the co-channel station involved. Furthermore, both stations have agreed to provide each other with "equivalent <sup>17/</sup> protection."

<sup>16/</sup> Appellant argues that this observation (Br. pp. 23-24) is inconsistent with the Commission's conclusion that the Coral application would have no adverse impact on UHF broadcasting. We do not see any inconsistency; the Commission simply determined that the gains in service and signal strength were themselves in the public interest, and yet were not of sufficient magnitude under the facts presented, to warrant concern about their possible adverse effect on UHF television.

<sup>17/</sup> "Equivalent protection" refers to the suppression of radiation so as to provide the co-channel station with protection from interference equivalent to what would be expected from the location of a transmitter at a site meeting all spacing requirements. See Interim Policy On VHF TV Channel Assignments, 21 Pike & Fischer, R.R. 1695, supplemented 21 Pike & Fischer, R.R. 1709 (1961).

Appellant suggests that the Commission failed to consider its previous determination that channel six could be operated in Miami without any short spacing. The Commission opinion did, however, refer to the prior determinations, Second Report on Deintermixture, 13 Pike & Fischer, R.R. 1571 (1956), and the Miami Drop-In Case, 15 Pike & Fischer, R.R. 1638a, (1957) reconsideration denied 15 Pike & Fischer, R.R. 1642a (1958). In the Second Report, supra, the Commission stated that a channel six facility could be operated in Miami which would meet all the Commission's technical rules. Again in the Drop-In Case, supra, the Commission indicated that it believed such operation would be possible, but it noted that the availability of a site could most effectively be resolved in an adjudicatory proceeding on a specific application, 15 Pike & Fischer, R.R. 1638 at 1640 and 1641. This observation was reinforced on reconsideration, where the Commission stated:

We also adhere to the view that, on the basis of the record, the allocation of Channel 6 to Miami should not be precluded because of the possibility that a site for such an operation meeting all spacing and coverage requirements might be infeasible because of aeronautical considerations. \* \* \* As we stated in our prior decision, the question of aeronautical hazards and limitations is one which can more readily be resolved - and one which we believe is more appropriately considered - at a time when particular applications with specific proposals for tower location and height are before us. (Footnote omitted) 15 Pike & Fischer, R.R. at 1642c.

The Commission also specifically observed:

Whether we might subsequently in an appropriate adjudicatory proceeding waive the rules with respect to separations if it should be determined in the light of specific cases that adequate coverage of Miami cannot be provided from antennas at sites which are both consistent with the rules and do not involve untoward hazards in air navigation we need not decide here. Id. at 1642d

We submit this language clearly indicates that the Commission had in view, when it assigned channel six to Miami, that waivers of technical requirements would be considered in an appropriate proceeding on a specific application. That is exactly the situation presented by the Coral application. Coral had filed an extensive catalogue of its efforts to find a satisfactory transmitter site (R. 197-205), as well as a letter from the FAA (R. 221-2) which indicated that only in two areas could broadcast towers be accommodated without intolerable interference to aeronautical interests. The Coral site is within one of these areas, and, noted the Commission, "a southward move would result in a location outside the approved area, and, presumably, conflict with aeronautical safety interests." (R. 462).

The Commission also explained why it found a waiver of the short spacing rule to be in the public interest:

The Commission has, for many years, been keenly conscious of the problems involved in locating appropriate sites for broadcast towers in the

Miami area. We think that the proposal before us represents the best opportunity to provide Miami with a fourth competitive VHF television service with a reasonable assurance of economic viability and deference to air safety considerations. On balance, it seems clear that those detriments flowing from operation in derogation of our rules to the extent here involved are far outweighed by the public interest considerations inherent in the early inauguration of another VHF television service to Miami and greater service to more persons with no loss to any. (R. 462)

Appellant also argues that the Commission's earlier indication of its willingness, in a subsequent adjudicatory, proceeding, to consider waiver of the spacing requirements should be overlooked because at that time the Commission was not as keenly interested as it is today in promoting UHF broadcasting. The short answer to this is that in this proceeding, in determining that a waiver of the spacing requirements was in the public interest, the Commission carefully considered the question of impact on UHF and concluded that the issue did not warrant further exploration. See argument I-A, supra, pp. 16-26.

Appellant contends that a hearing should have been held because the Commission ordered one on the short spaced application in WLCY-TV, Inc., supra. It suffices to note that the short spacing in this case is some 6 miles, whereas that in WLCY-TV, Inc. was some 38; in that case a question existed as to whether the gain in service would outweigh the

loss which the modification would bring about. Here there is no loss of service whatsoever.<sup>18/</sup> WLCY-TV, Inc. also involved a re-evaluation of a previously denied short spacing, whereas here the Commission had specifically refused at an earlier time to foreclose the possible operation in Miami of a short spaced channel six.

This Court has previously indicated that the Commission has some latitude in determining when a substantial and material question exists as to a request for short spaced operation:

We agree with the Commission that no substantial and material questions of fact were presented by the pleadings and attachments that could not be and were not resolved as a matter of law. The Commission further found that the modification . . . would result in a substantial net gain in coverage and that no showing had been made that this would be inconsistent with the public interest. Equivalent protection from interference, which was thought to be adequate as of the present time, was afforded to Capitol. We can not say that these conclusions are without support and are erroneous. The conditions set forth in Section 309(e) of the Communications Act, 47 U.S.C. section 309(e), for the holding of a hearing under that section thus are not present here. Capitol Broadcasting Company v. Federal Communications Commission, 116 U.S. App. D.C. 370, 373, 324 F.2d 402, 405 (1963).

<sup>18/</sup> In Blackhawk Broadcasting Co., 4 F.C.C. 2d 282, 8 Pike & Fischer, R.R. 2d 238 (1966), the Commission held that a short spacing request should be set for hearing, and appellant urges that this case is also inconsistent with the present one. (Br., p. 23). Blackhawk, however, involved a question whether a specific site in conformance with the rules might not be available. The applicant agreed that such a site was feasible if FAA approval could be obtained.

We submit that the Commission's decision to waive its spacing requirement was a reasonable one and well within its discretion.

C. The Commission Correctly Held That Appellant Raised No Substantial And Material Question Of Fact As To Transfer Of De Facto Control Of Coral.

Appellant argues (Br. pp. 24-27) that the Commission erred in finding that actual control of Coral had not been transferred, and in failing to explain its conclusion that a mere technical transfer of control had occurred.

The Commission's Memorandum Opinion and Order discussed at great length the allegations, and concluded that while a technical de jure<sup>19/</sup> transfer had occurred, de facto control of the Corporation remained with the original stockholders and that no attempt to deceive or misrepresent had been demonstrated (R. 464-467).

Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. section 310(b) provides that no transfer of a station license, or any rights thereunder, or control of any corporation holding such a license can occur prior to Commission consent. In interpreting this section of the Act, the Commission has stated that passage of control need "not be legal control in a formal sense, but may consist of actual control by virtue of

<sup>19/</sup> Technically, a transfer of (de jure) control occurs whenever 50% of the stock passes out of the hands of stockholders who held stock at the time the original authorization was issued. WHDH, Inc., 3 Pike & Fischer, R.R. 2d 579, 583 (1964).



the special circumstances presented." Town and Country Radio, Inc., 15 Pike & Fischer, R.R. 1035 at 1057 (1960), and this Court has endorsed this view. Lorain Journal Company v. Federal Communications Commission, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965) cert. denied sub nom. WWIZ, Inc. v. Federal Communications Commission, 383 U.S. 967 (1966). The question thus turns on the individual facts presented for decision.

The Commission's discussion of the facts is summarized in our counterstatement, supra, pp. 9-11. In essence, the Commission found that after all the ownership changes had occurred, the original stockholders held legal title to 43.4% of the stock but voted 50.4%. C. Terence Clyne, a new stockholder, voted 35%. This 35% had been acquired pursuant to a stock purchase agreement, under the terms of which Clyne became executive director; acquired the right to name three of the seven board members and acquired the right to block sale of the station (65% was required for a sale.)<sup>20/</sup> The agreement also provided that Clyne was to obtain a loan of \$600,000 for the corporation, which he did. (R. 465-467). The stock purchase agreement was immediately filed with the Commission, and was before it in a prior modification proceeding in which Coral's application was granted. The record shows that Coral was advised by counsel that this agreement did not involve a transfer of control. (R. 211-12). Clyne was later made chairman of the board.

<sup>20/</sup> Originally Clyne acquired 40%, later reduced to 35% through the sale of 5% to Hy Gardner.

The Commission observed that Clyne possesses no prerogatives or powers which are inconsistent with his position as the largest single stockholder; he cannot block sale of the station; he and his appointees own less than a majority of the stock and cannot, by vote of their stock, control the corporation. "Clyne cannot designate the majority of the Board of Directors and, lacking numerical superiority on the Board, they cannot control the Board of Directors or corporate policies." (R. 467). The Commission also noted that Clyne does not have the power to control the corporation finances, and concluded that there has been no transfer of de facto control.

The Commission noted, however, that a transfer of de jure control had occurred when the original stockholders lost legal title to 50% of the stock. Accordingly, noted the Commission, an application for transfer of control, pursuant to section 310(b) of the Act, 47 U.S.C. section 310(b) should have been filed. However, since Coral had filed all the facts with the Commission in its periodic ownership reports, and since there appeared to be neither a motive nor an intent to circumvent the processes of the agency the Commission found that the incident did not bar a grant of the application before it:

It is clear that Coral made no attempt to conceal or misrepresent the facts with respect to control of the Corporation, and we believe that the circumstances were such that reasonable men could differ as to whether there was a transfer of

control. Coral's failure to file an application for our consent to the transfer of control was an excusable one and Coral should not be penalized for an honest error in judgment. (R. 467).

We submit this decision is amply supported by the record, is clearly reasonable, and adequately considered.

Significantly, appellant does not quarrel with any of the facts as found by the Commission and enumerated above, except to raise the speculative possibility that Clyne might be in privity with some other stockholders, so that he could block sale of the station. There is nothing in this record to suggest that any privity exists. Under section 309(d) of the Act, 47 U.S.C. section 309(d), appellant has the burden of demonstrating the existence of "substantial and material questions of fact." Clearly, pure speculation cannot serve as a substitute.

Appellant also attacks the finding that Clyne did not control the corporation through control of its finances, alleging that in the event of a default, Clyne's own funds, used as collateral for the bank loan of \$600,000 would give him control. Here, too, appellant totally fails to meet the pleading and evidentiary standards of 47 U.S.C. section 309(d). There is nothing in this record to show that Clyne has the power to influence corporate policies through his guarantee of the bank loan. Nor is Clyne the only source of collateral; the remaining stockholders have agreed to pledge their stock to the bank as further security for the loan (R. 184).

In fact the record shows that Clyne has done nothing which would suggest an attempt to control the corporation. Three affidavits, including one of Clyne, factually undisputed, attest to this. (R. 206-212). By selling 5% of the Coral stock to Gardner, Clyne voluntarily relinquished negative control of the corporation, an act inconsistent with any intent to dominate corporate policies. Appellant notes (Br. p. 25) that Clyne has certain pre-emptive and other rights to Coral stock. The record establishes, however, that all Coral stockholders possess the same rights (R. 185). Appellant observes that the Commission erred in not considering these individual powers cumulatively. In fact, the Commission took great care to consider the total nature of Clyne's relationship to the corporation, by enumerating the various components thereof. The record clearly establishes that no transfer of de facto control occurred.

Finally, we emphasize that nowhere in the record is there a suggestion that the individuals concerned had any reason for effecting a transfer of control without the approval of the Commission.<sup>21/</sup> Thus unlike cases in which the Commission has found violations of Section 310(b) to be disqualifying, e.g., WWIZ, Inc., 36 F.C.C. 562, 2 Pike & Fischer, R.R. 2d 169 (1964), there is no evidence of bad faith, misrepresentation or intent to deceive. Indeed appellant does not argue the point.

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<sup>21/</sup> The Commission has consistently held that in cases of alleged unauthorized transfer of control the basic issue is one of character and intent. J. P. Beacom, 31 F.C.C. 1049, 21 Pike & Fischer, R.R. 340 (1961), and cases there cited.

In sum, appellant's attack on the Commission's decision contains no substantiation for the speculative assertions of counsel. There is nothing in this record which could possibly suggest that a substantial and material question of fact had been made out as to these matters. The appellant's charges of inconsistency are similarly unproven,<sup>22/</sup> and in fact the Commission's decision on this point was reasonable and well within its

22/ Cases cited by appellant are all distinguishable on their facts. In WLOX Broadcasting Co. v. Federal Communications Commission, 104 U.S. App. D.C. 194, 260 F.2d 712 (1958), this Court noted that a minority stockholder could be found to be the controlling voice in a corporation where he furnishes all the money for construction and initial operation, and where he will be able to dictate management of physical operations. In addition, the lender was to acquire 55% of the stock as security, and would be in a position to dictate the extension terms of the loan, if any. In Elyria-Lorain Broadcasting Co., 6 Pike & Fischer, R.R. 2d 191 (1965), the Commission found that the licensee had failed to inform the Commission of a shift of 50% of the stock, and held this to be an important omission because the acquisition of the stock by a local newspaper raised other public interest issues. The Commission also held that a hearing was required on the question of de facto control where one stockholder had 46% of the stock, was president, exercised many executive powers, was the only active stockholder, and where a majority of the officers had some link to the controlling party. In WHDH, Inc., 3 Pike & Fischer, R.R. 2d 579 (1965), the Commission determined that a question as to de facto control existed where a stockholder died who had been 23% owner, had been the principle stockholder, the moving force on the board of directors and one of three members on a proxy committee which had voted over 80% of the stock at a recent meeting. Similarly, in WWFZ, Inc., supra, the Commission enumerated many elements of control possessed by the minority stockholder which suggested that it actually controlled the corporation, e.g., control of the books and records, substantial control over corporate finances and expenditures, negative control over removal of directors, and provision for calling stockholders meetings on petition of only 25% of the stockholders. See 36 F.C. C. at 581, 2 Pike & Fischer, R.R. 2d at 194.

<sup>23/</sup>  
discretion.

D. The Commission Properly Declined To Hold A Hearing  
On The Adequacy Of Coral's Programming Survey.

Appellant urges (Br., pp. 30-31) that the Commission erred in not setting the Coral application for hearing on the question whether the needs and interests of the area to be served had been properly surveyed by Coral. See Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F.2d 191 (1962), cert. denied 371 U.S. 821 (1963). The Commission correctly concluded, however, that no hearing was warranted.

The present application of Coral is for modification of its construction permit, to allow for a number of technical modifications and to change the specified station location from South Miami to Miami. The changes now proposed will increase the area served by the Coral Grade B contour, improve the quality of the signal within the present grade B contour, and deprive no one of the Coral grade B service predicted in the existing authorization. Coral filed with the Commission, approximately four months before the instant application was filed, an extensive, thirty-five

<sup>23/</sup> Appellant argues, (Br. p. 27), that the acquisition by Clyne of a substantial interest in the Coral Corporation somehow vitiates the earlier findings on the financing and management aspects of Coral's qualifications. There is no requirement that every subsequent modification in an applicant which has prevailed in a comparative hearing must be reexamined. In any event, appellant failed to raise the point below, and hence is barred from raising it in this Court. 47 U.S.C. section 405; Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143; Florida Gulfcoast Broadcasters, Inc. v. Federal Communications Commission, 122 U.S. App. D.C. 250, 352 F.2d 726 (1965).

page analysis of 28 communities in the greater Miami area, detailing the manner in which Coral proposed to meet the needs and interests of the area, and pointing out the uniformity of program preferences and needs in the South Florida area (R. 9).

In granting the previous construction permit modification, the Commission had before it this survey, and in its Memorandum Opinion and Order here under review, the Commission properly noted that the Coral survey, concerned as it was with the greater Miami area, remained relevant to the present application, which is also designed to be an area-wide proposal. The addition of 21,000 to its grade B service area, representing only 1.6% of the grade B population covered by the prior authorization is entirely consistent with the applicant's prior area-wide survey of the Miami market. The Commission requires only that each applicant make a good faith effort to survey the area's needs and interests. AM-FM Program Forms, 30 Fed. Reg. 10195, 5 Pike & Fischer, R.R. 2d 1773 (1965): these program surveys need not conform to a set pattern, and Coral's documented survey efforts are clearly adequate to justify the proposed programming.

Cases cited by appellant are not inconsistent with the Commission's action here. In Louisiana Television Broadcasting Corporation v. Federal Communications Commission, 121 U.S. App. D.C. 24, 347 F.2d 808 (1965), this Court indicated that well established Commission policy requires that applicants for construction permit



modification provide detailed data on efforts to determine the programming needs of the entire service area. In that case the applicant, although assigned to the city of Houma with a population of 22,500, was attempting by its proposed modification to serve Baton Rouge, some 60 miles away, with a population of 193,000. The proposed modification would have resulted in a substantial geographical move involving loss of some grade B service, degradation of signal strength over a portion of the assigned city of Houma, and an increase in grade B population of 520,000.<sup>24/</sup>

In Wometco Enterprises, Inc. v. Federal Communications Commission, 114 U.S. App. D.C. 261, 314 F.2d 266 (1963), this Court held that a hearing should take place on a proposed modification of the facilities of two television stations. But here again the changes requested were of a considerable magnitude. The applicants were assigned to West Palm Beach, and sought to bring their service to Miami. The increase in grade B population for one station was from 318,000 to 1,424,000,<sup>25/</sup> and for the other from 629,000, to 1,512,000.<sup>26/</sup> Thus, both cases involved an attempt to serve an entirely new large metropolitan area, and in neither case was there any indication that the applicants had taken an area-wide survey of

<sup>24/</sup> See St. Anthony Television Corp., 2 Pike & Fischer, R.R. 2d 348 (1964).

<sup>25/</sup> See WEAT-TV Inc., FCC 62-226, reproduced in Joint Appendix filed with this Court in Case No. 17076, p. 39.

<sup>26/</sup> See Scripps-Howard Radio, Inc. 22 Pike & Fischer, R.R. 1054 (1962).

the general area proposed to be served by the increased facilities.<sup>27/</sup>

In this case, however, the change in grade B population is 21,000 a de minimis increase of 1.6% in the authorized grade B service, and is located on the immediate periphery of the previously authorized service area. And, as we have shown, the applicant has surveyed Miami and the surrounding area extensively. Appellant asserts (Br. p. 31) that Coral has not specifically surveyed the new service area in Delray Beach which includes the additional 1.6% grade B population. The fact is, however, that Delray Beach is contiguous with the greater Miami area which Coral has surveyed. There is no evidence in this record and no contention by appellant, that in fact Coral's programming will not be responsive to the needs and interests of the entire service area. Indeed the Commission has never held that an applicant in a large metropolitan area is obligated to survey separately every individual community lying within the grade B contour. What is required is a showing that an effort has been made in good faith by the applicant to familiarize himself with the general program needs and interests of the population living within his service area. And this showing Coral clearly made.

<sup>27/</sup> Also distinguishable on the same ground are St. Anthony Television Corporation, 8 F.C.C. 2d 294, 10 Pike & Fischer, R.R. 2d 38 (1967), Blackhawk Broadcasting Co., 4 F.C.C. 2d 282, 8 Pike & Fischer, R.R. 2d 238 (1966) and Grayson Enterprises, Inc., 29 Fed. Reg. 3372 (1964).

E. Appellant Failed To Raise Any Question Of Fact As To Coral's Effectuation Of Its Past And Present Construction Promises.

Appellant also argues (Br. pp. 28-9) that the Commission should have set the Coral application for hearing on the question whether Coral could be relied upon to construct as promised, and that the Commission erred in not discussing this issue in the Memorandum Opinion and Order.

We submit the appellant's argument is frivolous on both counts. In its filings before the Commission, Coral discussed at great length its efforts to secure an antenna site which would best serve Miami while complying with Commission and FAA requirements. (R. -188-193, 197-205). In response to this extensive showing, appellant submitted the following:

Coral has submitted its explanation of its failure to perform in accordance with its promises. These explanations merely show that Coral's consistent objective has been to improve its authorized facilities, rather than construct (in accordance with representations) to meet the allegedly pressing need for broadcast service. (R. 237)

It is plain there was no contested question of fact such as to raise a substantial and material issue; thus a hearing on the question would have served no purpose. Section 309(d)(2) of the Act, 47 U.S.C. section 309(d)(2) specifies that the Commission may make a grant where it finds no substantial and material questions of fact and that a grant would be in the public interest, issuing "a concise statement . . . [which shall] dispose of all substantial

issues raised by the petition." Appellant raised no substantial issue on this point, and its efforts to collaterally attack successive changes in authorized facilities each of which had previously been approved by the Commission, is out of place.

Moreover, Coral demonstrated that it had expended more than \$400,000 in pre-operation expenses (R. 189, 317). And subsequent to the Commission's decision, actual construction has begun, thereby removing any question as to the likelihood of such construction occurring.<sup>28/</sup>

#### CONCLUSION

Appellant's request that this Court set aside the Commission's opinion and order a hearing on Coral's application is unaccompanied by a single allegation of fact which, if proven in a hearing, would warrant denial of the application. There is nothing either in its brief or in the papers filed with the agency to indicate that a hearing would be productive of any significant information not already known by the agency and taken into account

<sup>28/</sup> Although appellant argues that Coral could not be relied on to build the requested facilities, it nevertheless requested that this Court issue a stay, pendente lite, alleging that it and the public would be injured by the commencement of service prior to a full review by this Court. And intervenor's opposition to the stay made clear that construction was taking place and that there was little doubt that the station would soon be on the air. The details of this construction are supplied in the affidavit of Thomas N. Dowd, attached to Coral's Opposition to Petition for Stay, filed with this Court on May 2, 1967.

in its decision. Appellant simply disagrees with the Conclusions reached by the Commission, but having failed to show that the result is arbitrary or irrational, its appeal amounts to nothing more than a request that this Court substitute its judgment for that of the Commission. This is of course not a proper function of judicial review, and accordingly the Commission's order should be affirmed.

Respectfully submitted,

HENRY GELLER,  
General Counsel,

JOHN H. CONLIN,  
Associate General Counsel,

WILLIAM L. FISHMAN,  
Counsel.

Federal Communications Commission  
Washington, D. C. 20554

July 17, 1967

APPENDIX A

EXCERPT FROM TESTIMONY OF MR. JOHN E. McCOY, VICE-PRESIDENT AND SECRETARY OF STORER BROADCASTING COMPANY, GIVEN ON DECEMBER 5, 1966, IN THE PROCEEDING OF CHARLES W. JOBBINS, ET AL., DOCKET NOS. 15752, ET AL.

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\* \* \* \* \*

Q. . . . What are call letters of the Miami UHF station referred to in lines 4 and 5 of the second page of Exhibit 9?

A. WGBS-TV.

Q. Now, that station, sir, went off the air in 1957?

A. That is correct.

Q. And it has not been on the air since that time?

A. That is correct.

Q. And at this time there is some type of a modification pending?

A. No, sir. We did have ---

Q. Isn't there a modification to increase power pending?

A. No. We have a construction permit to install a directional antenna which will change the pattern of the antenna to a north and south orientation to serve the coast better. That is partially constructed.

Q. Is it the present intention of the Storer organization to activate this Miami UHF?

A. No. We are endeavoring to dispose of the UHF station

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to somebody who will put it on the air ---

Q. Have you so informed the Commission, sir?

A. We have but informally, however.

Q. What do you mean by "informally"?

A. We advised two members of the Commission.

\* \* \* \* \*

REPLY BRIEF FOR APPELLANT

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 20,845**

---

L. B. WILSON, INC.,

*Appellant.*

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee.*

CORAL TELEVISION CORPORATION,

*Intervenor.*

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ON APPEAL FROM A MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

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**FILED** AUG 16 1967

*Nathan J. Paulson*  
CLERK

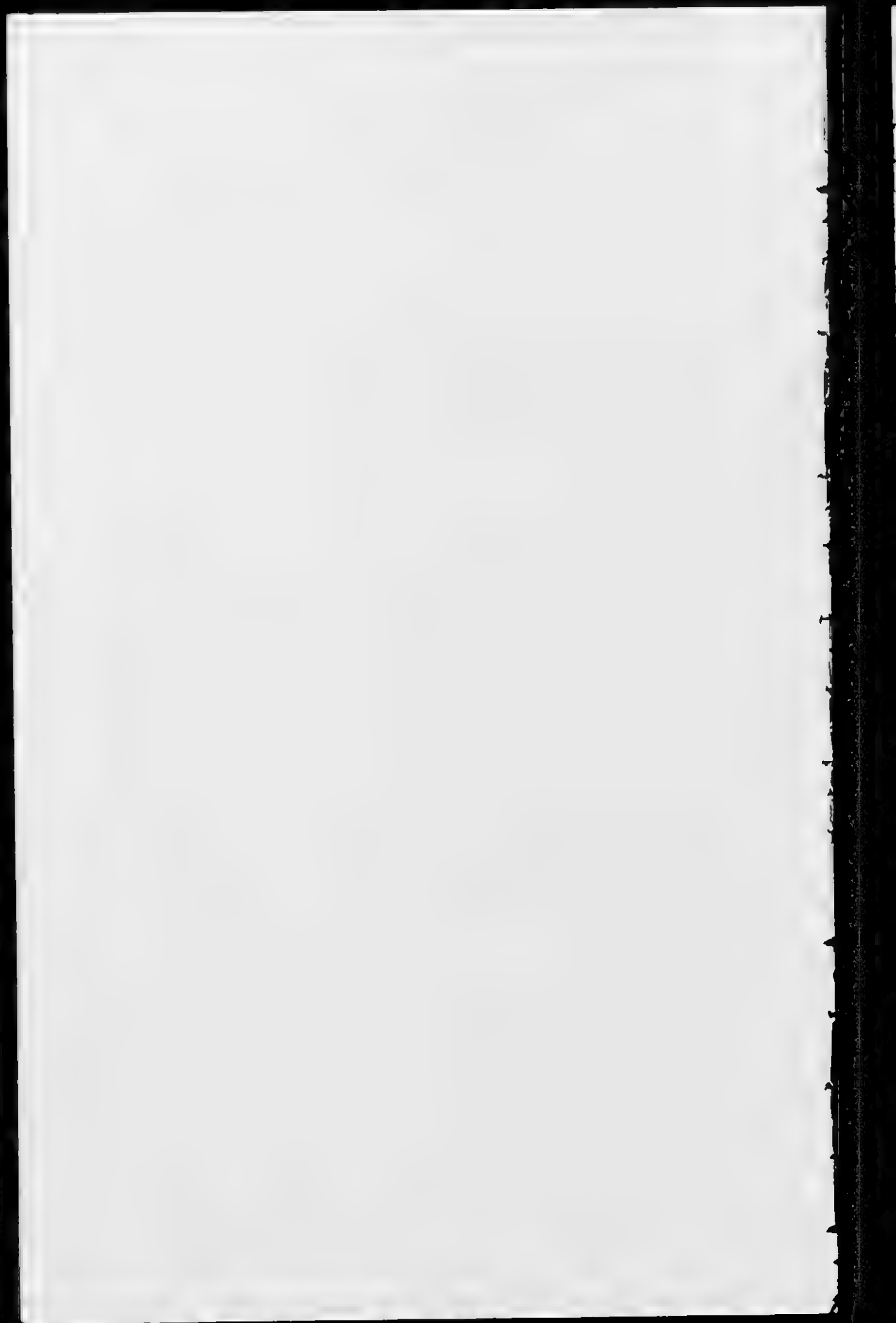
August 8, 1967

ROBERT A. MARMET  
PETER L. KOFF

1822 Jefferson Place, N.W.  
Washington, D.C. 20036

*Counsel for Appellant*





(i)

IN THE

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ON APPEAL FROM A MEMORANDUM OPINION AND ORDER  
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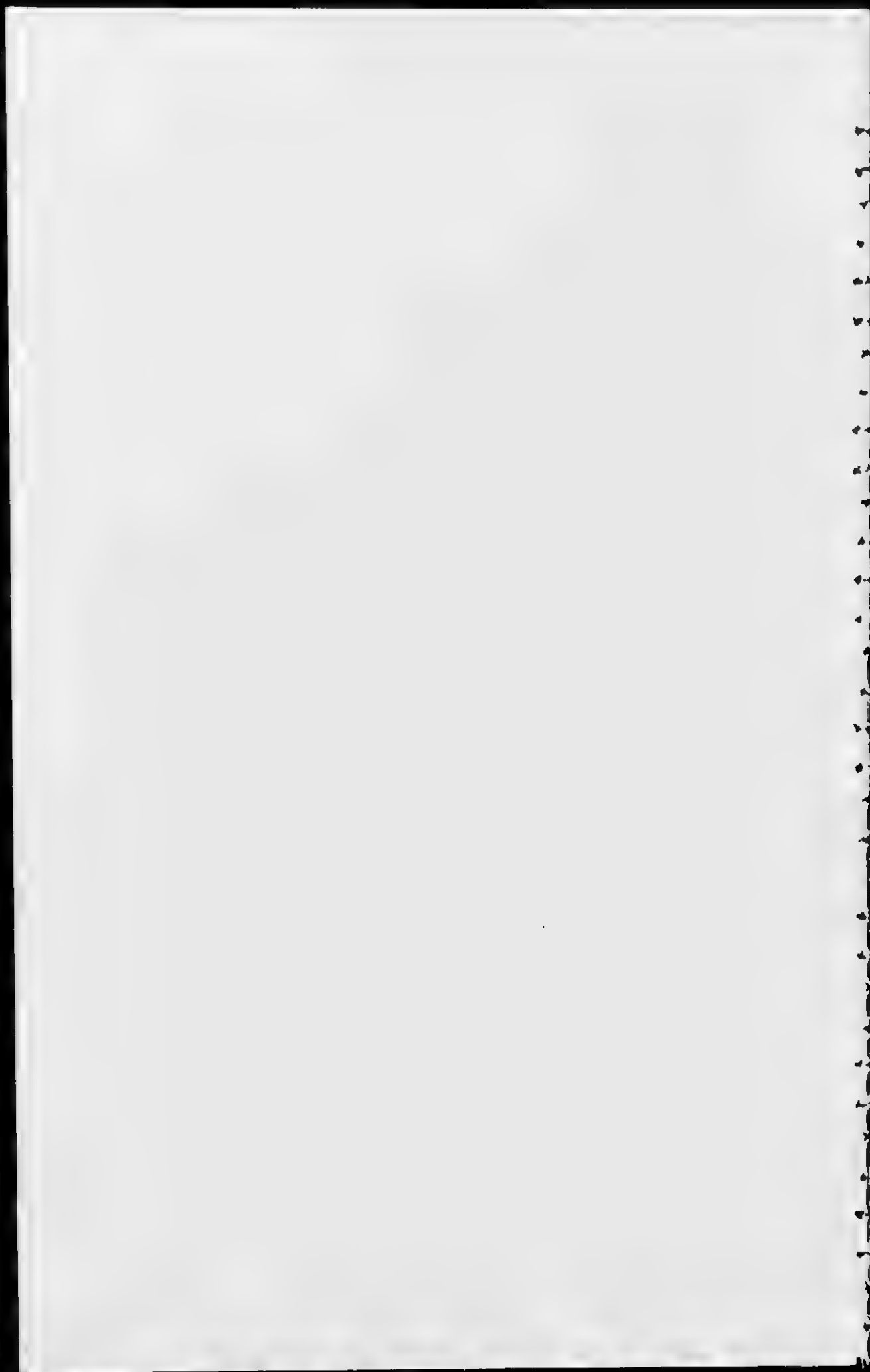
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REPLY BRIEF FOR APPELLANT



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**Serious Public Interest Questions Were Raised by the Coral Application and Presented to the Commission in Pre-Grant Pleadings Such as to Warrant an Evidentiary Hearing**

**A. Coral's Application Proposed A Significant Improvement In Its Authorized Facilities**

It must be emphasized, at the outset of this Reply Brief, that the application which Coral filed with the Commission proposed a very significant improvement in Coral's authorized facilities. As approved by the Commission, Coral's transmitter site relocation will enable Coral to double its previously approved antenna height, to locate its transmitter on the mainland of Florida, to increase the number of persons within its principal city service area by 53.3%, to change its station location from South Miami to Miami, and to intensify substantially Coral's signal strength throughout its primary service area. In the face of these most significant and fundamental changes in Coral's authorized facilities, therefore, appellant cannot but marvel at the misplaced attempt of Coral (Br. 13) and the Commission (Br. 21) to picture these changes as being very modest in scope.

Not only did Coral's application propose a dramatic increase in its authorized facilities, but the facilities sought by Coral necessitated a request for waiver of two Commission rules. Since Coral's application necessitated a waiver of the Commission's spacing requirements, the Coral application was "inherently deficient" from the outset.<sup>1</sup> In fact, the Commission has consistently refused to waive its

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<sup>1</sup>The Commission has stated that *any* proposal necessitating a waiver of the required minimum co-channel separation distances is "inherently deficient." *Black Hawk Broadcasting Co.*, 8 RR 2d 238 (1966).

spacing rules "except where a most pressing urgency has been demonstrated . . .," and except in limited and unusual circumstances where overriding considerations of public interest have so warranted. . . ." *Mid-New York Broadcasting Corp.*, 8 RR 2d 247, 251-52 (1966). Since Coral requested and received a waiver of the spacing rules, therefore, it is clear that the Coral application was much more than a routine application for improvement of facilities.

Thus it seems unfortunate that Coral (Br. 13, 28) has chosen to attack the integrity of appellant and its legitimate role of a "private attorney general" in opposing the Coral application and in bringing the instant appeal. Because of the substantial improvement in facilities sought by Coral, and because the Coral application raised a number of serious and important public interest issues, appellant exercised its statutory right and duty to call these matters to the attention of the Commission, in order that all aspects of the public interest would be fully explored and considered by the Commission prior to action on the Coral application.

It is completely irrelevant that the co-channel station in Orlando, Florida, WDBO-TV, the station that Coral is now authorized to short-space, did not choose to oppose the Coral application. Nor is it at all relevant or significant that no UHF operator in the Miami area is participating in the Court appeal. Contrary to the claims of Coral (Br. 13), the absence of these parties from the instant proceeding has absolutely no bearing whatsoever on the merits of the *public interest* issues that have been properly raised by the three pre-grant objectors below and by appellant on this appeal.

#### **B. The Commission Itself Had Substantial Doubts Concerning Its Action**

Although Coral attempts to picture appellant as no more than harassing and impeding the administrative and judicial processes, the truth of the matter is that the Commission itself had grave doubts concerning the wisdom of its



own action granting, without hearing, the Coral application. As previously pointed out by appellant, the Commission approved the Coral transmitter move by a vote of 4 to 3, with one of the majority voters choosing — without explanation — to concur in the result only. This fact, in and of itself, clearly demonstrates that the public interest considerations now being raised by appellant have substantial merit, since only by a bare majority did the Commission itself grant the Coral application, yet without a full explanation of its conflicting views.

## II

### **The Commission's Unexplained Inconsistent Treatment of the UHF Impact Issue and the Short-Spacing Issue Is Improper and an Abuse of Discretion**

Both the Commission (Br. 19-32) and Coral (Br. 17-23, 32-34) take the same basic position with respect to appellant's claims that the Commission acted erroneously and abused its discretion in not submitting the questions concerning UHF impact and short-spacing to the evidentiary process of a hearing, and that the Commission failed to give an adequate explanation of the reasons for its action. Accordingly, appellant's Reply Brief will respond to those arguments jointly.

#### **A. The Commission's Decision Is Based Upon an Erroneous Factual Premise and Its Findings Are Plainly Inconsistent**

It is emphasized by both parties (Commission Br. 26-30; Coral Br. 21) that the Commission, in originally assigning Channel 6 to Miami, indicated its willingness to consider at a later date an application for a short-spaced transmitter location, and that the Commission's grant of the Coral request merely fulfilled a long-standing Commission objective of bringing a fourth competitive VHF service to Miami. This argument is completely lacking in substance.

The Commission's 1957 and 1958 decisions to allocate Channel 6 to Miami emphasized over and over again the

Commission's firm belief that a site would be available south of Miami, at *proper spacing distances*, which would enable the Channel 6 facility to bring needed additional television service to Miami. *Miami Drop-In Case*, 15 RR 168a (1957), *reconsideration denied*, 15 RR 1642a (1958). The Commission did indicate, however, that it might consider a waiver of the spacing rules, when a specific application came before it, but "in an appropriate *adjudicatory proceeding*".<sup>2</sup> The Commission failed, by refusing to designate the Coral application for hearing, to provide the type of adjudicatory proceeding that it previously indicated might be held after an appropriate application for a specific transmitter site.

Moreover, neither of the opposing briefs offers any helpful explanation of the inconsistency between the diametrically opposed conclusions of the Commission that compelling public interest factors justify waiver of the spacing requirements, yet the substantially improved facilities of Coral will have no adverse impact whatsoever on UHF development.<sup>3</sup>

The inconsistency in the Commission's treatment of these two questions obviously stems from one of the basic weaknesses in its opinion that neither the Commission nor Coral has explained. The Commission's opinion, in setting forth the compelling public interest factors that justified a waiver of the short-spacing rules, emphasized the *increases in signal strength* that would be made possible by grant of the Coral application (R. 461). The Commission specifically refer-

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<sup>2</sup>*Miami Drop In Case, supra*, 15 RR at 1642d. It also should be noted that the Commission's objective in assigning a fourth VHF station to Miami was "to provide greater opportunities for television growth and for comparable and effective competition among stations in the area." *Id.* at 1642c. The Commission inaccurately now states in both its decision below (R. 461-62) and brief (Br. 26-27) that its purpose was "to provide a fourth *competitive* VHF service." (Emphasis added).

<sup>3</sup>Coral has not even attempted to come forward with an explanation on this crucial question.

red to the increase of 256,000 persons within the proposed *principal city contour* and the 127,000 persons within the proposed *Grade A contour* that would result from grant of the Coral application. <sup>4</sup>

Yet, in discussing the UHF impact question, the Commission completely ignored the above increases in signal strength that would take place within the heart of Coral's service area. Instead the Commission attempted to downgrade the significance of Coral's proposed improvements by referring solely to the increase of 21,000 persons within Coral's *Grade B contour* that would receive Coral's signal for the first time. The Commission's opinion then went on to make this startling statement:

"Otherwise, the only effect of Coral's proposal would be a general improvement of signal strength throughout its authorized Grade B area." (R. 463).

When called upon by appellant (Br. 23-24) to explain why the Commission's treatment of and conclusions on the short-spacing and UHF impact issues are not hopelessly inconsistent, neither appellee nor Coral can offer any rational justification. The Commission's brief (Br. 27, n. 16) completely avoids this question by claiming the Commission simply determined that the gains in service would be in the public interest, but would not be of sufficient magnitude to warrant concern about their effect on UHF television. <sup>5</sup>

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<sup>4</sup>It also should be noted that the Commission weakens its own case for waiving the spacing requirements by stressing that Coral already placed a principal city signal over 90% of Miami (Br. 28), and that there were already a quantity of VHF and UHF stations authorized in the area (Br. 20-21). The Commission defines predicted coverage of the signals of television broadcast stations in Section 73.684 and Section 73.685 of its Rules.

<sup>5</sup>In fact, the Commission's argument in its brief regarding this inconsistency runs precisely counter to the explanations it offered in its decision as to why a waiver of the spacing requirements was justified. Also note that the Commission (Br. 21), in attempting to explain why its determinations on the UHF question were proper, refers to the improvements in Coral's facilities as being *very slight*.

The Commission does not, however, explain why its opinion below stressed so heavily the gains in service and signal strength that would occur *within the heart of Coral's service area* as a reason for waiving its spacing requirements, while at the same time the Commission quickly dismissed these increases in signal strength as being very minor in concluding there would be no harmful impact on UHF television. Instead, the Commission justified its conclusion on the UHF impact issue by repeatedly emphasizing the alleged *de minimis* increase in the number of persons *within the fringes of Coral's service area*.

Clearly, however, the Commission cannot have it both ways. It is submitted that since the record <sup>6</sup>clearly showed that Coral was proposing a significant and substantial increase in the number of persons within its principal city (53.3% increase) and Grade A (14.8%) service areas, and since the Commission expressly relied upon these gains in justifying granting a waiver of its spacing rules, the Commission had a duty to discuss specifically and clearly why these same increases would not have a harmful impact upon UHF television. This is especially so because it was Storer Broadcasting Company, the permittee of Miami Channel 23, which specifically called these facts to the Commission's attention. Yet these figures are not even discussed in the Commission's treatment of the UHF impact question. <sup>7</sup>

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<sup>6</sup>R. 488, 493.

<sup>7</sup>The allegation of Coral (Br. 30) that this argument lacks substance because the Commission "appears expressly to have accepted Storer's figures . . ." misses the point completely. The Commission never discussed these figures in relation to the UHF impact question, nor did it treat that issue and the short-spacing issue consistently in the same basic factual posture.

**B. Support for the Wholly Improper Disposition of the Short-Spacing and UHF Impact Issues Is Not Found in Previous Decisions of This Court or in Prior Commission Cases**

In attempting to justify the Commission's handling of the short-spacing and UHF impact questions, both appellee and Coral place major reliance upon two decisions of this Court as evidence of the allegedly wholly proper manner in which these matters were disposed of by the Commission in the instant case. Regarding the short-spacing issue, the case of *Capitol Broadcasting Co. v. FCC*, 116 U.S. App. D.C. 370, 324 F.2d 402 (1963) is cited<sup>8</sup> to the effect that the Commission has complete discretion in deciding whether to hold a hearing on the short-spacing question.

As to the UHF impact issue, both the Commission (Br. 21) and Coral (Br. 19) rely upon this Court's decision in *Jackson F. Lee v. FCC*, \_\_\_\_ U. S. App. D.C. \_\_\_\_, 374 F.2d 259 (1967), to support the Commission's determination that a hearing was not required on this issue. It is submitted, however, as fully explained below, that each of these cases is so totally different on its facts that neither of them can serve as precedent for the arbitrary and erroneous action of the Commission in the present case.

First, the factual background of the Commission's decision<sup>9</sup> which was appealed in *Capitol Broadcasting* is completely different from the background of the present case. Prior to grant of the short-spaced application in *New Orleans Television*, the Commission had expressly recognized that in order to provide New Orleans with a third competitive VHF facility, there would be ample justification for approving a short-spaced application that would propose "equivalent protection" to the co-channel station whose mileage separations would be derogated. *Interim Policy on*

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<sup>8</sup>Commission Br. 31; Coral Br. 22-23.

<sup>9</sup>*New Orleans Television Corp.*, 23 RR 1113 (1962).

*VHF TV Channel Assignments*, 21 RR 1710a, 1710f (1961). The Commission felt, therefore, that the critical need of and pressing urgency for immediately bringing a competitive third VHF service to New Orleans would more than outweigh the detriments of permitting a short-spaced facility in New Orleans. For this reason, the Commission held in *New Orleans Television* that exceptional circumstances did exist for permitting a short-spaced application in the interim period before full utilization of the UHF channels could be achieved.<sup>10</sup>

A completely different factual situation, however, is presented by the instant case. The Commission's assignment of Channel 6 to Miami was made with the express indication that a short-spaced transmitter site would not have to be utilized. Since three network-affiliated VHF stations already served Miami, Miami was not among the list of communities where the Commission had indicated exceptional circumstances did exist for permitting short-spaced facilities. Moreover, the grant of the Coral application did not come in the "interim period" before full utilization of the UHF band could be achieved, but this grant was made precisely during the period of Commission television allocations whose primary objective is the full utilization and development of UHF television services.<sup>11</sup>

Furthermore, the import of *Capitol Broadcasting* has been substantially reduced by this Court's later holding in *Louisiana Television Broadcasting Corp.*, 121 U.S. App. D.C. 24, 347 F.2d 808 (1965), that the short-spacing issue should not ordinarily be decided summarily.<sup>12</sup> It is clear therefore,

<sup>10</sup>*New Orleans Television Corp.*, *supra*, 23 RR at 1115.

<sup>11</sup>See Section 330 of the Communications Act, the so-called "All Channel Receiver Law" of 1962.

<sup>12</sup>In attempting to distinguish *Louisiana Television*, Coral makes the completely erroneous statement that the improvements in its service to Miami were directed solely to the community that it was originally licensed to serve (Br. 19 n. 17, Br. 22 n. 21). Aside from the fact that Coral's improvements in signal strength would extend

that this Court's decision in *Capitol Broadcasting* offers absolutely no justification for the Commission's failure, in light of the pre-grant objections raised concerning this issue, to designate the Coral application for hearing on the short-spacing question.<sup>13</sup>

The *Lee* case is also readily distinguishable from the present case, and it clearly does not serve as a precedent for justifying the Commission's action in light of the completely different factual situation presented by these two cases. In *Lee*, at the time the Commission granted the modification application in question, the UHF objector did not even have an application on file with the Commission, and the Commission therefore held this objector was without standing as a "party in interest". *Atlantic Telecasting Corp.*, 3 F.C.C. 2d 442, 7 RR 2d 297 (1966). Moreover, in that case the UHF objector and the VHF television station operator served two completely different communities not part of the same metropolitan area, communities separated by many miles. For this reason, there was only a slight increase in signal strength — from Grade B to Grade A — at the fringes of the VHF station's service area, whereas in the present case a VHF station *not yet on the air* proposed a substantial increase in signal strength within the very heart of the *common primary service area* of the VHF and

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to many communities beside Miami, and that at least one new community would be served for the first time, Coral has *never* been licensed to serve Miami. It has, until now, been a *South Miami* station. In fact, see Coral's own Statement of the Case to this effect (Br. 2, 4).

<sup>13</sup>A hearing is required, under Section 309(d), if either a substantial and material question of fact is presented, *or* if the Commission is unable to make the affirmative finding that grant of a contested application would serve the public interest, convenience, and necessity.



UHF stations.<sup>14</sup> Thus as opposed to *Lee*,<sup>15</sup> Storer did specifically address itself to the question of increased signal strength within its primary service area, yet the Commission failed specifically to discuss this point.

Perhaps *Lee* is most distinguishable from the present case because in *Lee* no waiver of any rules was necessitated, whereas here the Commission had to waive two of its rules. This major distinction was first brought out in appellant's opening brief (Br. 18-19). Coral has not chosen to answer this contention, and instead it merely cites *Lee* (Br. 19) as if that case can dispose of this issue without further elaboration. The Commission's brief (Br. 23) does attempt to face this issue, but it does so by making the puzzling statement that the waivers involved herein "are minor in nature." What the Commission ignores, however, is that an application requesting *any* derogation of the spacing requirements is considered deficient.<sup>16</sup>

In supporting the Commission's handling of the UHF question, and its conclusion that the pre-grant objectors failed to raise a substantial and material question of fact in sufficiently specific terms such as to warrant designation of the Coral application for hearing,<sup>17</sup> both appellee (Br.

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<sup>14</sup>The Commission misses the point by saying the present case is factually similar to *Lee* because the increases in signal strength in *Lee* occurred within the heart of the UHF service area. That fact, alone, is irrelevant. A struggling UHF operator is much more likely to be adversely affected by an increase in the strength of a VHF station's signal in the very area where reception of this signal is strongest and most reliable, than it would be by an increase at the fringes of the VHF service area where the signal is weaker and the competition for viewers and advertising less severe.

<sup>15</sup>The UHF objector in *Lee*, in fact, stated that "predictions of the impact of a strong new VHF signal upon development of a new local service in the UHF band cannot be made with precision." See *Atlantic Telecasting Corp.*, 7 RR 2d at 301.

<sup>16</sup>*Black Hawk Broadcasting Co.*, 8 RR 2d 238 (1966).

<sup>17</sup>Appellant concedes that the 1960 amendments to Section 309 of the Communications Act imposed substantially higher standards on

24-25) and Coral (Br. 33-34) take issue with the claim of appellant in its opening brief (Br. 17-20) that the Commission's recent treatment of the "UHF impact" issue has been inconsistent and lacks even-handedness. There appellant pointed out that the factual allegations in support of Storer's petition to deny were far more specific than the allegations raised in *Lee*, and at least as specific as the allegation raised in another recent case <sup>18</sup> where a UHF impact issue was designated for hearing.

Since appellant has been challenged to support its original claim, it has set forth in Appendix A hereto all of the factual allegations in the WLCY-TV record concerning UHF impact, and in Appendix B the factual allegations raised by the objector in the *Lee* case. As can be clearly seen when comparing *Lee* and *WLCY-TV* to the present case, the Commission has yet to come up with a clear and consistent standard for judging requests for a UHF impact issue.<sup>19</sup>

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petitioners to deny to come forward with specific factual allegations, in order to eliminate the procedural abuses of the former Section 309. Clearly, however, no such abuses have marked the instant case, as readily shown by the votes of three Commissioners.

<sup>18</sup> *WLCY-TV, Inc.*, 6 F.C.C. 2d 550, 9 RR 2d 142 (1966).

<sup>19</sup> Although the Commission (Br. 24) emphasizes that one UHF licensee and two UHF permittees requested a hearing on the UHF impact issue in *WLCY-TV*, the factual allegations of these UHF parties certainly do not meet the test of specificity that the Commission has attempted to apply herein. See Appendix B.

## III

**The Record Clearly Indicates That a Hearing Would  
Produce Substantial Information Necessary to a  
Proper Determination of the Many Public Interest  
Factors Involved in This Case**

Appellant cannot disagree more with the conclusion of the Commission that:

“There is nothing either in its brief or in the papers filed with the agency to indicate that a hearing would be productive of any significant information not already known by the agency and taken into account in its decision.” (Br. 43-44).

Because the Commission has made a wholly improper assessment of what factual information could be developed at a hearing that is not now in the record, appellant will briefly describe some of the information that a full evidentiary hearing would produce.<sup>20</sup>

**A. Short-Spacing Issue**

The Commission's failure to designate the Coral application for hearing has precluded an evidentiary examination of whether there is an alternative site, meeting all Commission spacing requirements, at which Coral could locate its transmitter and still provide adequate coverage throughout its service area. Moreover, a hearing on this issue could develop evidence concerning whether the increased signal strength throughout Coral's service area is essential and necessary for Coral to provide the kind of service to the public envisioned by the Commission when it assigned Channel 6 to Miami in 1957.

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<sup>20</sup>See *Central Coast Television*, 6 RR 2d 719 (1966), wherein a UHF impact issue was designated for hearing based only upon the simple statements of a UHF permittee not yet on the air that the VHF station's increased signal strength and penetration will cause economic injury to the UHF station.

### B. UHF Impact

Substantial factual evidence on this question would result should this Court remand the present case for a hearing on the UHF impact issue. For instance, expert evidence of television station representatives and marketing consultants would give a clear indication of the degree of added competition Miami UHF stations would face as a result of the substantial increase in signal strength that the Commission has authorized for Coral.<sup>21</sup>

In this regard, it should be noted that there is already evidence on file with the Commission, yet not in this record, of the degree of added competition that a Miami UHF permittee feels it will face as a result of the grant of the Coral application. As pointed out in the Reply of appellant to the oppositions to its Petition for Stay Pendente Lite, the permittee of Miami Channel 39<sup>22</sup> has already had to undergo an extensive re-evaluation of its entire programming concept and the extent to which it "should be initially developed" as a direct result of the added competition it will now face from Channel 6. Because appellant believes the factual statements of this UHF permittee are indicative of the type of evidence that could be adduced at a hearing, appellant has reproduced in Appendix C hereto the complete statement made by this UHF permittee in its request for extension of completion date which was filed with the Commission on April 28, 1967.

Both the Commission (Br. 23-24) and Coral (Br. 18, n. 16) call attention to the fact that Storer has filed an application for consent to assignment of its construction permit, and the fact that Storer abandoned its plan to resume op-

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<sup>21</sup>The Commission, in its CATV cases, has expressly recognized the value of an evidentiary hearing for developing evidence on the extent to which a CATV system may impair the prospects for successful development of UHF television. See, e.g., *General Electric Cablevision Corp.*, 10 RR 2d 226 (1967).

<sup>22</sup>Tele-Americas Corp. of Fla. (BPCT-3636).

eration of Channel 23 prior to the Commission's grant of the Coral application, as supposed evidence of the fact that grant of this application has had no effect whatsoever on the proposed reactivation of Channel 23. Had the Commission conducted a hearing on this question, however, the evidence of record would have demanded a contrary conclusion.

Attached hereto as Appendix D is the complete explanation of Storer as to why the filing of the Coral application, in light of the number of competitive signals already available in Miami and its own previous experience, made it completely inadvisable for Storer to go forward with its plans for reactivation of Channel 23. In this appendix appellant has included both the text of Storer's May 12, 1966, letter to the Commission, and Storer's reasons for requesting assignment of its construction permit as set forth in the assignment application.

Moreover, certain aspects of this assignment application should be noted. While Storer has agreed to sell all of its tangible property connected with the Channel 23 station for a price of \$250,000, plus an agreement to install the transmitter, antenna and studio equipment at its own expense, the estimated replacement cost of those assets is \$853,100. In addition, Storer itself suffered operating losses of over \$500,000 in the period 1954 to 1957. The proposed assignee of the Channel 23 permit has been exceptionally fortunate to seek to acquire the title to the Storer assets for such a low cost. This fact, in and of itself, reflects how marginal are the prospects for successful UHF development in the Miami area, and it is facts such as these that could be brought out at a hearing, but which are not now in the record.

### C. Transfer of Control

A full evidentiary hearing on the transfer of control issue would be especially useful in developing that kind of information not now in the record, but which information would

shed light on whether actual control of Coral has passed from the original shareholders to Mr. Clyne.

Information concerning complex intra-corporate relationships and understandings is the kind of information that remains within the private knowledge of the corporate parties, and it imposes an almost impossible burden upon an outside party to demonstrate, without the aid of an evidentiary hearing and the right to cross-examine witnesses, that control of a corporation has passed from the original shareholders to a new party.

In this regard, it should be noted that appellant, relying solely upon public information on file at the Commission,<sup>23</sup> developed enough evidence on the control issue to convince the Commission that a transfer of *de jure* control had taken place. This was so despite the fact that Coral plainly and categorically denied this allegation as being "unfounded" and apparently based upon "a mistake in analyzing the Coral ownership reports." (R. 181). The Commission disagreed with Coral on this point, and it is reasonable to assume the further information that could be developed at a full evidentiary hearing would reveal a substantial amount of additional evidence to support appellant's claims that a transfer of *de facto* control of Coral has occurred.

#### D. Suburban Issue

Since Coral plainly admits that it has never surveyed the 21,000 persons within its new Grade B contour (Br. 26-27), an evidentiary hearing to determine whether the programming needs and interests of these new persons are the same as the needs and interests of the areas Coral has previously surveyed should be held. We do not know this to be a fact at present. Instead, we only have Coral's completely factually unsupported "feeling" that the needs and inter-

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<sup>23</sup> Although Coral, in opposing appellant's allegations on this issue, did attach affidavits of three of its principals (R. 197-232), appellant had no opportunity to cross-examine these people.

ests of these people are the same (Br. 27). It is not up to the appellant, as Coral maintains, to demonstrate in this appeal that these needs and interests are in fact different. Rather, it is up to Coral to demonstrate in its application that it has surveyed *all* of the people within its proposed new service area.<sup>24</sup>

Since Coral has not demonstrated that it has met the long-established policy of the Commission, well-recognized by this Court, that stations proposing to serve new areas must establish that they have taken reasonable steps to ascertain the programming needs and interests of their entire new service area, the Coral application should have been designated for hearing. The answer of both the Commission (Br. 41) and Coral (Br. 26) that this was not necessary because Coral's new service area was allegedly *de minimis* misses the point, since the Commission's opinion below completely failed to explain why this case is properly an exception to its well-established *Suburban* requirements.

It should also be noted that in *KTBS, Inc.*, 25 RR 301 (1963), an applicant proposing to increase its service area by only 1,500 square miles and to include portions of three new communities (total increase of only 80,567 persons) was given 30 days to make necessary surveys and determine any necessary changes in its proposed programming. The Commission could have taken this course of action, or it could have ordered a hearing, as it did in *Black Hawk Broadcasting Co.*, 8 RR 2d 238 (1966), wherein an applicant proposed to bring new service to only 156,461 new persons including two new cities with a total population of 77,597.

#### E. Readiness to Construct Issue

Both the Commission (Br. 42-43) and Coral (Br. 30-31) allege that no hearing was required on the question of whether Coral may be relied upon to construct its station in accord-

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<sup>24</sup>*Louisiana Television Broadcasting Corp.*, *supra*. See appellant's opening brief (Br. 30-31).



ance with its past promises, and that, in any event, this issue has become moot because Coral has in fact begun construction at its new site. Accordingly, both the Commission and Coral state that a hearing on this question, at this time, would serve no purpose.

What has not been convincingly explained, however, is that the Commission's opinion below was so inartfully drafted that no explanation whatsoever is given for the Commission's failure to discuss specifically the reasons why one of appellant's basic allegations was not disposed of, in accordance with the clear requirements of Section 309(d)(2). In fact, it is the purpose of Section 309(d)(2) to protect the rights of parties, such as appellant, who raise legitimate issues in pre-grant petitions to deny, and to require that all substantial issues are properly disposed of by the Commission. <sup>25</sup>

#### CONCLUSION

For the above reasons, and for the reasons set forth in appellant's opening brief, this Court should reverse this case and remand it to the Commission for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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<sup>25</sup>See *H. R. Rep. No. 1800*, 86 Cong. 2nd Sess. (1960).



APPENDIX A

Pre-Grant Objections on UHF Impact Issue  
*WLCY-TV, Inc.*, 9 RR 2d 142 (1967)

1. Excerpts from Petition to Deny of WSUN, Inc., licensee of WSUN-TV, Channel 38, St. Petersburg, Florida, filed with the Commission February 23, 1966.

\* \* \*

- I. *Relocation of the WLCY-TV Transmitter Would Jeopardize the Continued Operation of WSUN-TV, the Only Independent UHF Station Serving the St. Petersburg-Tampa Area.*

Station WSUN-TV has served the St. Petersburg-Tampa area on UHF Channel 38 continuously since 1953, until recently as an affiliate of the American Broadcasting Company Television Network. However, when WLCY-TV commenced operations, the ABC Network switched its affiliation to that station, forcing WSUN-TV to compete against three VHF network affiliates as the only independent UHF station in the area. Since losing its network affiliation to WLCY-TV, WSUN-TV has incurred heavy operating deficits, and its continued operation is now economically precarious.

If WLCY-TV were now permitted to relocate its transmitter and thereby greatly increase the strength of the signal over the St. Petersburg-Tampa area, WSUN-TV's economic position would become untenable. As WLCY-TV concedes, it "is not able to provide city-grade service to all of Tampa or to any part of St. Petersburg" (Request for Waiver, p.3). WSUN-TV, on the other hand, places a city-grade signal over all of both cities. This superior coverage of WSUN-TV *vis-a-vis* WLCY-TV offers WSUN-TV its only real hope of continued economic viability, since if WLCY-TV were to increase the strength of its signal, and eliminate WSUN-TV's superior coverage, much of the audience that remained to WSUN-TV after its loss of a network affiliation would thereupon also be lost to it. Under the circumstances, this addi-

tional audience loss could well result in the demise of WSUN-TV, the only commercial UHF outlet operating in this area.

II. *In View of the Adverse Effect on WSUN-TV, a Waiver of the Mileage Separation Requirement Would Be Contrary to the Public Interest.*

The Commission has consistently held that in determining whether the mileage separation requirement should be waived in any particular case, the question of possible impact on UHF operations is a matter of vital concern. Where the possibility of such impact has been found — even where there were no operating UHF stations in the area — the Commission has without exception refused to grant a waiver. For example, in the “drop-in” proceedings (Docket 13340), the Commission established, as a basic criterion, that a short-spaced assignment is “justified only insofar as it does not add to the burdens which already beset UHF operations and which it is our determined purpose to relieve wherever and however possible.” *Interim Policy on VHF Television Channel Assignments*, 21 RR 1695, 1696. In a later Memorandum Opinion and Order, the Commission restated this standard as follows:

“We have therefore limited our proposal to specific major communities where it is possible to add a meaningful VHF operation without causing undue interference, where the operation of two VHF stations effectively precludes the establishment of UHF service . . . and where the addition of new VHF stations will not have a palpably adverse impact on existing UHF operations in other communities.” 21 RR at 1710(c).

The significance of the impact on UHF, as a factor in determining whether mileage separation requirements should be waived, has not been limited to cases where new channels were sought to be added. Thus, in *Channel Assignment in Oklahoma City*, 25 RR 1780, the Commission waived

the mileage separation rule to permit an existing station to relocate its transmitter only after finding that the waiver would have "no adverse consequences on UHF development."<sup>1</sup> Since a waiver of the mileage separation rule in this case would have "adverse consequences" on the operation of WSUN-TV, it is clear that WLCY-TV's request for waiver is patently inconsistent with one of the basic standards governing disposition of such requests, and, therefore should be dismissed without hearing. Cf. *Oregon Radio, Inc.*, 14 RR 147.

Further, even if it were concluded that dismissal without hearing was not warranted, WLCY-TV's request for waiver may not be granted without a full evidentiary hearing. *Louisiana Television, Inc. v. Federal Communications Commission*, 347 F.2d 808. In that case, the Commission had waived the mileage separation rule to permit Station KMHA-TV to relocate its transmitter from a site near Houma, the city of assignment, to a new site near Baton Rouge. The Court of Appeals reversed the Commission on the ground, *inter alia*, that the Commission had failed to properly consider the effect of the waiver on the development of UHF service in Baton Rouge, and the Court held that before a waiver could be granted, an evidentiary hearing was required to determine if the relocation of the KMHA-TV transmitter would be consistent with the Commission's policy of encouraging UHF development.

Since there was no operating UHF station in Baton Rouge at the time, whereas here there is an operating UHF station and a *prima facie* case has been established that a waiver would jeopardize its continued operation, it follows, *a fortiori*, that such an evidentiary hearing would be required here.

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<sup>1</sup>Significantly, the Oklahoma City case is one of the cases relied upon by WLCY-TV as "analogous situations" (Request for Waiver, p. 3). Obviously, the Oklahoma City case is not at all analogous. Nor for that matter are any of the other cases cited by WLCY-TV since in none of them was the question of adverse impact on UHF presented.

2. Excerpts From Petition to Deny of L. B. Wilson, Inc., Licensee of WLBW-TV, Channel 10, Miami, Florida, filed with the Commission February 25, 1966.

\* \* \*

3. The proposed operation would be destructive to UHF television, existing and proposed

12. The Tampa-St. Petersburg area is ideally situated, at present, for development of multiple UHF telecasting service. Station WSUN-TV operates on Channel 38 in St. Petersburg, with a high degree of set conversion. Hillsboro Broadcasting Company, on September 7, 1965, filed an application for a new station on Channel 49. The benefits of multiple services operating in both the VHF and UHF bands seem assured if the present competitive structure in the area is maintained.

13. WLCY-TV, Inc., proposes to change this competitive structure by seeking to improve its own competitive position. In so doing, this applicant faces a dilemma of utmost significance. On the one hand, it can justify the extraordinary relief which it seeks only on a theory that it must improve its competitive position. On the other hand, it is clear beyond argument that if WLCY-TV improves its competitive position, it must do so at the expense of present and potential UHF operations. Thus to justify this move, the applicant must admit that it will hinder, if not destroy, a realization of one of the Commission's most cherished goals — development of all-channel telecasting. While the Commission stands ready to improve competitive conditions in a market, it does not do so at the expense of UHF development.

14. The basic defect in the applicant's plans is apparent in the application itself. At page 3 of Exhibit No. 1 (WLCY-TV's request for waiver of the Rules), the applicant refers to six cases to support its request for short spacing. Very significantly, there was no problem of adverse impact upon

UHF telecasting in any of these cases. Had there been, it is clear that none of these short spaced assignments would have been permitted. The entire course of action followed by the Commission in recent years is opposed to the concept of a short spaced assignment which would injure UHF.

15. In no area of policy or precedent has the Commission so consistently followed a steady course comparable to that which it has followed in its efforts to encourage the development of UHF. After it became apparent that a truly nation-wide competitive service could be achieved only by maximum development of healthy stations in the UHF band, the Commission was successful in persuading Congress that unprecedented legislation would be required to foster UHF development. "All Channel Receiver Legislation" imposed heavy burdens upon manufacturers and the public, but it was considered worthwhile to develop maximum television service. Since passage of this legislation, the Commission has consistently and without variance followed a policy to protect and foster the development of UHF television service. There are many UHF assignments, with Bradenton, Sebring and Sarasota as examples, that can be expected to be activated in the near future. The course of development will be reversed if WLCY-TV is allowed to violate the co-channel spacing regulations and move its transmitter to a location where it will be possible to destroy existing and potential UHF service to the Tampa-St. Petersburg market and nearby areas. A brief review of the course which the Commission has followed to protect UHF development helps to place this case in proper perspective.

a. *VHF Drop-Ins*, 25 RR 1687 (1963). After passage of all-channel set legislation, the Commission rejected proposals to bring new VHF television service to seven major cities, because VHF assignments in these cities would deter the growth of UHF. The Commission recognized that VHF service would more quickly satisfy local needs, "but such action seems shortsighted compared with our primary goal of providing the optimum conditions of UHF growth."



*Id.* at 1691. It is significant that in this case *seven* major cities were deprived of an immediate third service because of the need to protect UHF. It is interesting to contrast this decision with the instant application, which seeks to improve the competitive position of one station at the expense of all UHF development.

b. *KTIV Television Co.*, 2 RR 2d 95 (1964). Applications for increase in tower height and move of the transmitters of VHF television stations were set for hearing because the increased signal would further encroach upon the service area of an existing UHF television station. "The Commission's concern with the plight of UHF stations in a VHF dominated area is too well known to require discussions here." *Id.* at 97.

c. *Triangle Publications, Inc.*, 3 RR 2d 37 (1964). The Commission refused to permit the move of a VHF television station's transmitter, not only because it would encroach upon areas already served by UHF stations, but also because it would merely place a new signal in various Connecticut towns, having the effect of discouraging the use of UHF channels allocated to these communities. The Commission stated that "we have deemed it essential to foster optimum conditions for the growth of UHF and to take no steps, unless required by other exceptional public interest considerations, which would reduce the demand for UHF." *Id.* at 53.

d. *Selma Television, Inc.*, 4 RR 2d 714 (1965). The Commission set for hearing an application to move the transmitter of a VHF television station, *despite the fact that the VHF station was losing money*, because of the impact of the move upon UHF development. The Commission recognized the "inescapable conclusion" that UHF stations will suffer losses from the introduction of an improved VHF signal in the area. *Id.* at 720.

e. *Channel Assignment in Bloomington-Indianapolis*, 5 RR 2d 1744 (1965). The Commission refused to allow a

VHF station to become a fourth VHF station in the market because it would discourage UHF development.

16. From a review of the above cases, it is interesting to note that these cases concern only the impact of a VHF signal upon UHF development. They were not aggravated by the additional factors which are present in the instant case, a massive and unprecedented derogation of the Commission's minimum spacing rules, as well as the history showing that the applicant had never relied upon an expectation to move in.

17. Significantly, on the one recent occasion when the Commission authorized a short spaced VHF assignment to provide a third VHF service to a market, the Court of Appeals remanded the case to the Commission to determine whether this action would violate the Commission's policy of encouraging the development of UHF channels. *Southern Louisiana Broadcasting Corp. v. FCC*, \_\_\_ U.S. App. D.C. \_\_\_, 15 RR 2d 2024 (1965). The Court also required that a hearing be held to determine "whether the public interest justifies a waiver of the required minimum co-channel mileage separation." This appellate decision was decided on facts strikingly similar to those in the instant case.

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3. Excerpts From Objections of Association of Maximum Service Telecasters, Inc., filed With the Commission on March 2, 1966.

\* \* \*

E. GRANT OF THE WLCY-TV PROPOSAL WOULD  
HAVE AN ADVERSE IMPACT ON UHF.

21. Another reason for summary dismissal of the WLCY-TV application for a short-spaced VHF station is the substantial adverse impact that grant thereof would have on existing and potential UHF service in the area. *Louisiana Television Broadcasting Corp. v. FCC*, 347 F.2d 808 (D.C. Cir. 1965). As is shown in Section I, *supra*, the Com-

mission's concern for UHF development has been one of the main reasons that it has heretofore insisted on utilization of Channel 10 at Tampa/St. Petersburg consistent with mileage separation requirements.

22. Although WLCY-TV makes no reference to the fact, Tampa/St. Petersburg has had a commercial UHF station actually in operation for a long period of time. WSUN-TV, Channel 38, began operation in 1953 and is still on the air. The advent of WLCY-TV on Channel 10 at its present site meeting mileages has already had impact on WSUN-TV, for WLCY-TV recently obtained the ABC Network affiliation previously held by WSUN-TV. This development was, however, fully consistent with engineering standards. If WLCY-TV were to be granted the short-spaced site it seeks with greatly increased height, it would be expected to have an even greater adverse impact on *existing* UHF commercial service by WSUN-TV. The Commission heretofore has held that it would not waive its engineering standards to facilitate such adverse impact on UHF. *Second Report and Order on Deintermixture* (Docket No. 11532), 13 R.R. 1571 (1956); *VHF Drop-Ins*, 25 R.R. 1687 (1963).

23. Moreover, under the Commission's recently adopted table of assignments in Docket No. 14229, unreserved UHF Channels 28 and 44 are also assigned to Tampa/St. Petersburg and an application for an additional UHF station is pending. Grant of the short spacing WLCY-TV seeks would in like manner be expected to jeopardize future utilization of the UHF channels allocated to Tampa/St. Petersburg.

24. In addition, two unreserved UHF channels have been assigned to other communities not within the present WLCY-TV Grade B contour that are either within the proposed WLCY-TV computed Grade B or just beyond it. They are Channel 35, Orlando, and Channel 40, Sarasota. Two applications are pending for Channel 35, and one for Channel 40. Moreover, Lakeland, where unreserved Channel 32 is assigned and which is now barely within WLCY-TV's present Grade B contour, would receive City Grade

service from WLCY-TV if its proposal is granted. Future utilization of the above channels could be hampered if the WLCY-TV short-spaced application were granted.

25. Thus, grant of the WLCY-TV proposal with its threatened adverse impact on UHF would be at odds with the aim of the all-channel receiver legislation and wholly inconsistent with the past FCC policy determinations and decisions in general, and in regard to Channel 10 at Tampa/St. Petersburg, in particular, set forth in Section I, *supra*.<sup>1</sup>

\* \* \*

4. Letter of Objection of Sarasota-Bradenton Florida Television Co., Inc., filed with the Commission on April 6, 1966.

\* \* \*

1. As the applicant for UHF Channel 40, Sarasota, Florida, (File No. BPCT-3687, Accepted for filing Jan. 10, 1966) We are gravely concerned with the application for modification of the construction permit for WLCY-TV, Channel 10, Largo, Florida.

2. In seeking the UHF construction permit for our community, we intend to provide the *First Local City Grade Service* to some 175,000 residents. Our application documents the need for programming of *Local* origin and *Network* programs *not now received* by most viewers in this area.

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<sup>1</sup>The record of MST's vigorous efforts in support of the all-channel legislation, and its underlying policy of fostering sound UHF development side-by-side with VHF in the same communities and areas, is clear and unquestionable. Equally clear and unquestionable is MST's vigorous support of the principle that UHF development would be hindered, contrary to the intent of the Congress when it enacted the all-channel receiver legislation, by VHF assignments made in violation of the Commission's established engineering standards embodied in the minimum mileage separation requirements.

3. It is our belief that Network programming is concomitant to program success, especially in a small market. Therefore, we included in our proposed schedule the program service of the American Broadcasting Company, which we consider to be most in need of coverage in the area we hope to serve.

4. Grant of the Short-spacing requested by WLCY-TV, would negate any possibility of an ABC-TV Network affiliation for our proposed station. Thus, the operation of said UHF Station and future UHF development in our area would be greatly hindered.

5. Further, we believe that approval of WLCY-TV's application would be contrary to the intent of Congress when it enacted the all-channel receiver legislation and inconsistent with FCC established engineering standards. The adverse impact on UHF development would jeopardize the future use of UHF channels throughout this entire area.

6. Having studied the objections to the WLCY-TV Proposal filed by interested parties, we concur with and support these objections.

\* \* \*

5. Letter of Hubbard Broadcasting, Inc., filed  
With the Commission August 4, 1966.

\* \* \*

[Salutation omitted]

Subject application requests a move to a new site, and increased antenna height. Objections have been filed on behalf of WSUN-TV and AMST.

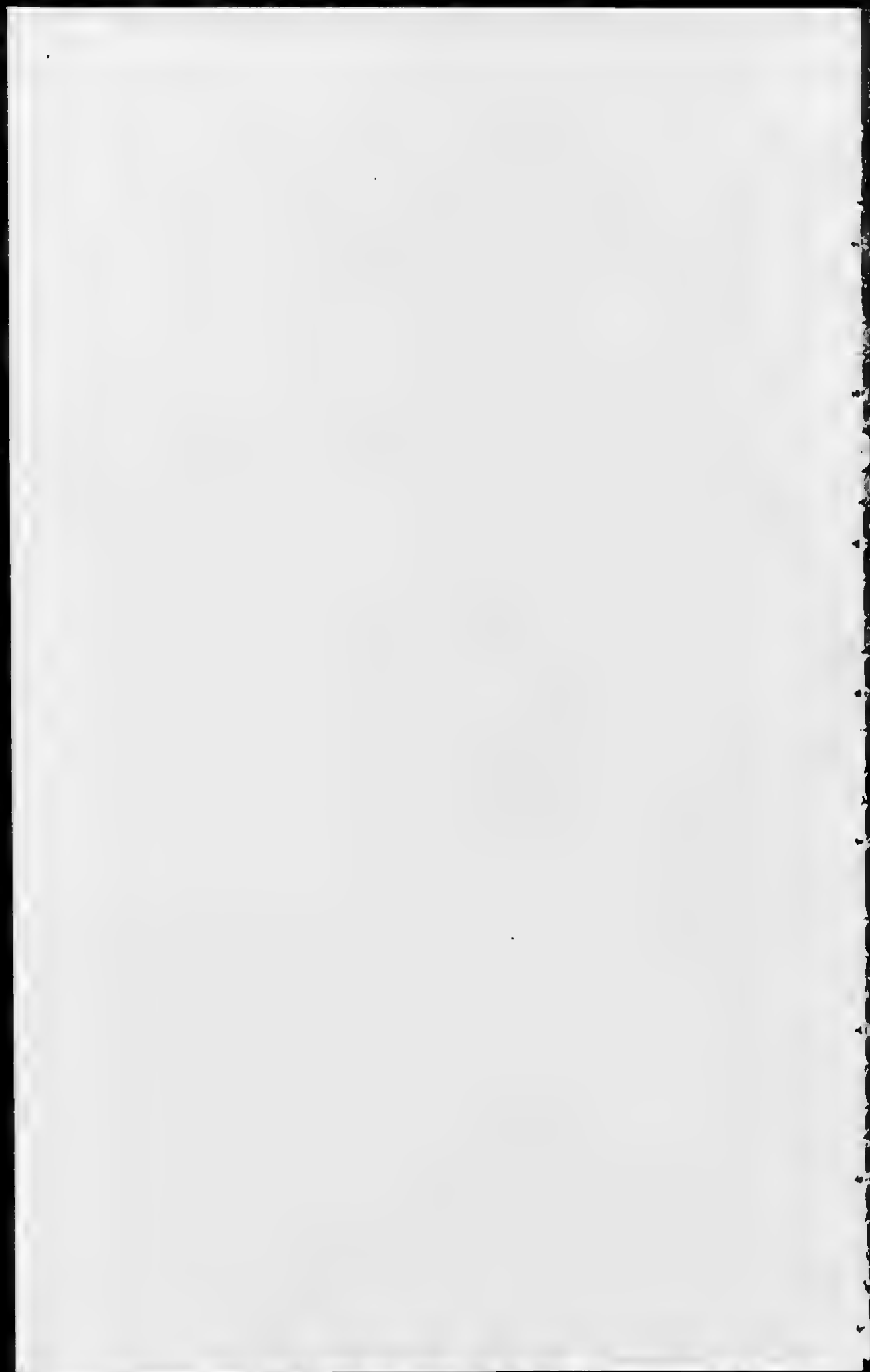
Hubbard Broadcasting, Inc. has recently filed an application for a new UHF station in St. Petersburg. Granting the application of WLCY would aggravate the competitive situation and make it more difficult for a new UHF station to become established and viable.

If a new CATV system were proposed for St. Petersburg, the Commission would undoubtedly order a full evidentiary

hearing to determine its impact on the development of UHF television. The proposed change in WLCY's facilities would obviously have a far greater impact on UHF than a cable system.

Hubbard Broadcasting respectfully requests the Commission to not grant a waiver of the rules necessary for favorable action on WLCY's application and to either dismiss the application or designate it for hearing to evaluate its impact on the development of UHF.

[Complimentary close omitted]





# APPENDIX B

Excerpts from Petition for Reconsideration Filed by Jackson F. Lee and Cumberland Broadcasting Corp. With the Commission on February 9, 1966, Denied by Memorandum Opinion and Order on April 13, 1966. *Atlantic Telecasting Corp.*, 7 RR 2d 297 (1966).

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## C. *Impact Upon Development of UHF Television Service in Fayetteville.*

6. It seems almost superfluous to state that the Commission has expressed great concern about development of telecasting in the UHF band of the spectrum. Many years ago, it was recognized that if television broadcasting was to become a truly nation-wide service with maximum service to local communities, it would be necessary to develop healthy stations in the UHF band. Pursuant to this objective, the Commission succeeded in convincing the Congress that unprecedented legislation was required to foster the development of this service. Since that time, the Commission has steadily maintained a course designed to protect and foster the development of UHF television service. This course will clearly be reversed if WECT is allowed to move to Fayetteville, and this is the practical effect of the proposed move in transmitter location. A brief review of recent Commission actions helps to place this case in perspective.

7. A chronological review of cases showing the Commission's concern for development of UHF telecasting since the passage of "all-channel receiver legislation" describes the course which has been steered so steadily for the past few years:

a. *VHF Drop-Ins.*, 25 RR 1687. The Commission rejected proposals to bring a new VHF television service to seven major cities, because VHF assignments in these cities would deter the growth of UHF. It was recognized that

VHF service would more quickly satisfy local needs, "but such action seems shortsighted compared with our primary goal of providing the optimum conditions for UHF growth". (25 RR at 1691).

b. *KTIV Television Co.*, 2 RR 2d 95. Applications for increase in tower height and a move of the transmitters of VHF television stations were set for hearing because the increased signal would further encroach upon the service area of an existing and established UHF television station. "The Commission's concern with the plight of UHF stations in a VHF dominated area is too well known to require discussion here." (2 RR 2d at 97).

c. *Triangle Publications, Inc.*, 3 RR 2d 37. The Commission refused to permit the move of a VHF television station's transmitter, not only because it would encroach upon areas already served by UHF stations, *but also* because it would place a Grade A signal in New London and Norwich, thus delaying, if not discouraging the use of UHF channels allocated to these communities. The Commission stated that it:

"... deemed it essential to foster optimum conditions for the growth of UHF and to take no steps, unless required by other exceptional public interest considerations, which would reduce the demand for UHF service". (3 RR 2d at 53)

d. *Selma Television, Inc.*, 4 RR 2d 714. The Commission set for hearing an application to move the transmitter of a VHF television station, despite the fact that the VHF station was losing money, because of the impact of the move upon UHF development. The Commission recognized the "inescapable conclusion" that a UHF station will suffer losses from the introduction of an improved VHF signal in the area. (4 RR 2d at 720).

e. *Channel Assignment in Bloomington-Indianapolis*, 5 RR 2d 1744. The Commission refused to allow a VHF station to become the 4th VHF station in a market because it would discourage UHF development.

8. In light of the above cases it is clear that the Commission must either set the Atlantic application for hearing or drastically alter its policy designed to foster the development of UHF telecasting. Fayetteville is presently ripe for development of a local UHF television service. The effects of "all channel receiver legislation" are being felt. At present Fayetteville is not served by any citygrade signals and by only one weak Grade A signal from WTVD, Channel 11, Durham-Raleigh, North Carolina. Both WECT and WRAL-TV, Channel 5, Raleigh-Durham provide all of Fayetteville with only Grade B service. A very small part of the city receives Grade B service from WGHP-TV, Channel 8, Greensboro, High Point and Winston-Salem, North Carolina.<sup>5</sup> The community is sufficiently distant from present VHF transmitters to encourage construction of a new UHF station. It is apparent from a review of the Cumberland application, however, that prospects are not sufficiently bright to allow intrusion of a strong VHF signal of citygrade quality if UHF service is to thrive. The applicant's projections of revenue are based upon the present status of competition (See Ex. 3 to Cumberland application). The applicant's proposed programming includes attractive network programs deemed necessary for economic survival (See Ex. 4 to application). Clearly, as the applicant has stated, any increase in VHF signal strength in the market will severely prejudice its opportunity to obtain revenue and network service.

9. A simple review of the Atlantic application demonstrates the immense competition which WECT proposes in the Fayetteville market. In fact, it is clear that Atlantic really proposes a "move-in" to Fayetteville while maintaining a technical assignment to Wilmington. Operating as proposed, Atlantic will barely place a citygrade signal over Wilmington. A signal of almost equal strength will be placed in Fayetteville. Atlantic proposes auxiliary studios in Fay-

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<sup>5</sup>Statements concerning existing service are based upon examination of the Commission's license files.

etteville. Fayetteville is a larger market than Wilmington,<sup>6</sup> and will consequently receive extensive attention from Atlantic's sales department. The intensive nature of the competition which may be expected in Fayetteville if WECT is allowed to move is quite clear.

10. Furthermore, it seems clear that there is no overriding public interest consideration which requires that station WECT move toward Fayetteville. In Exhibit No. 2 to its application, Atlantic states that its net income, after Federal Income Taxes, has exceeded \$100,000 in calendar years 1962 and 1963.

### Conclusion

Predictions of the impact of a strong new VHF signal upon development of a new local service in the UHF band cannot be made with precision. Nevertheless, the Commission has not hesitated in the past to resolve any possible doubt in favor of UHF development. In the instant case, it is clear that the WECT move to Fayetteville will place ponderous burdens upon development of a local service in that community. These burdens may well be crushing. Station WECT is thriving at its present location. There is no reason that Atlantic's desire for a larger audience should be allowed to stifle a new local service in Fayetteville. The public interest requires that the Atlantic application be set for hearing on issues concerning impact upon development of local UHF service to Fayetteville.

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<sup>6</sup>Cumberland County (Fayetteville) contains 33,200 TV homes compared to New Hanover County (Wilmington) with 19,600 TV homes (1965 *TV Factbook*, p. 455-b).

APPENDIX C

**Application of Tele-Americas Corp. of Fla. for Extension of Time Within Which To Complete Construction of UHF Television Broadcast Station WTML, Channel 39, Miami, Florida (BMPCT-6543, filed April 28, 1967).**

The exhibit attached thereto stated as follows:

In connection with application for additional time to construct TV station (UHF-TV Channel 39 at Miami, Fla.) the following information is submitted as part of application Form 701 with reference to paragraphs 3, 4 and 5 of said application.

Tele-Americas Corp. of Fla. first sought a Construction Permit for a TV station in Miami, Fla. in 1964. After various delays and amendments the C.P. was granted in 1966. At the time of original application the television broadcasting industry in the Miami area appeared to be settled and static. Since receipt of the Construction Permit by Tele-Americas Corp. of Fla. the Commission has granted a second UHF Permit and has granted a modification of Construction Permit to a VHF station (Channel 6) which makes this station (WCIX-TV) another VHF competitor in the Miami area.

In view of these changes Tele-Americas has found it advisable and prudent to spend the money and effort in a detailed and in depth market survey concerning the latin american audience it seeks to serve. This has been done for two reasons: to determine the extent to which a UHF station in Spanish would serve the Miami metropolitan area even if a Spanish service were to be provided on a part time basis by another VHF station; and to determine the extent to which station WTML should be initially developed in view of the new situation.

To this end, two market and research firms have been employed by Tele-Americas the firm of Frazier, Gross & Co.

of Washington, D.C.; and the firm of First Research Inc. of Miami, Fla. These two firms have prepared and conducted a survey of Dade County, Fla., which at this writing indicates the necessity for some upgrading of the initial plans for WTML. The results of the First Research project are now being tabulated and analyzed. Preliminary analysis is very positive.

We have been in contact with equipment manufacturers. Mr. George A. Mayoral Consulting Engineer for Tele-Americas, has held meetings with General Electric Co. and RCA sales and engineering people. Both GE and RCA have submitted quotations and specifications. Mr. Mayoral has ordered the Control Room film chain equipment from Visual Electronics Corp. and said equipment is now available. In addition, Mr. Mayoral has held discussions with Townsend Associates Inc. concerning details of the required transmitter equipment, and with Mr. Peter Onnegan of Jampro Products Inc. (UHF antennas) concerning design and availability of a specific Jampro antenna for installation atop 100 Biscayne Blvd. Bldg. It now appears that some modification of C.P. will be necessary as original operating details of WTML. These modifications concern antenna pattern and beamtilt requirements, and higher effective radiated power, to better serve the area.

Request for modification of C.P. as it presently stands, cannot be filed at this time due to inability of Townsend and Jampro engineers to supply the needed information promptly.

It is expected that transmitter and antenna deliveries can be made within six months (by Sept. 1967) and installation completed by November of 1967. The equipment is being purchased and financed through Visual Electronics Corp.

It is respectfully requested that the Commission grant Tele-Americas Corp. of Fla. an extension to its present C.P. to construct WTML, as per information herein supplied.

/s/ Juan E. Serralles, III  
Secretary

APPENDIX D

**Reasons of Storer Broadcasting Company for Suspending Construction of WGBS-TV, Channel 23, Miami, Florida, and for Requesting Consent to Assignment of Construction Permit.**

**1. Text of Storer's Letter to Commission dated May 12, 1966:**

This is in reference to UHF Television Station WGBS-TV, Channel 23, Miami, Florida, of which Storer Broadcasting Company is permittee.

As the Commission's records reflect, Storer operated Station WGBS-TV for approximately two and one-half years until April 1967, when it suspended operations after suffering operating losses of \$432,978.52. The efforts which Storer devoted toward UHF in those years are outlined in its April 1, 1967 letter request for authority to suspend operations.

In the May 13, 1965 oral proceeding on idle UHF permits, Storer advised that it would reconstruct and reactivate WGBS-TV, if existing competitive conditions were maintained in the market, i.e., if no additional channels were assigned and if the facilities of the Miami area and West Palm Beach VHF stations were not modified to increase their competitive impact in Miami (Dockets 15889 et al., Tr. 132). Simultaneously with this commitment, Storer applied for, and was later granted, modification of the WGBS-TV construction permit to specify custom-designed directional facilities (BMPCT-6108, granted July 22, 1965).

Looking toward reactivation of WGBS-TV, Storer has reacquired the tower, transmitter building and land formerly used by WGBS-TV, ordered the directional antenna specified in its construction permit, secured and substantially installed the new transmitter, repaired and repainted the tower, and designed modifications to the transmitter build-



ing so as to accommodate proposed studios. In addition, it has named a General Manager who is presently Operations Manager at Storer's WSPD-TV, Toledo, Ohio.

Subsequent to Storer's commitment to reactivate WGBS-TV, two additional commercial UHF channels have been assigned to Miami. In addition, the Palm Beach Channel 5 licensee has applied to move southward and increase facilities so as to cover all of Miami with Grade A service and substantial portions of it with principal city service (BPCT-3656). Finally, the South Miami Channel 6 permittee has applied to move to the mainland from its Ragged Keys site, double its antenna height, and be re-designated as a Miami station (BMPCT-6256). Storer has carefully examined these developments and concluded that a grant of either the Palm Beach Channel 5 or South Miami Channel 6 application would make impracticable the resumption or continuation of WGBS-TV's UHF operations at this time. Considering the number of competitive signals now available, and considering also the present conditions of program product availability and UHF set saturation, it is Storer's opinion that the proposed move-ins of Channel 5 or 6 would forestall effective UHF development in this market for the foreseeable future.

Although Storer has submitted formal oppositions to both the Channel 5 and 6 applications, it cannot now foresee or predict their outcome. Accordingly, until such time as they have received final action, Storer has reluctantly concluded that further activity with respect to WGBS-TV must be suspended.

Entirely apart from the continuing and additional commitment of financial resources to the Channel 23 venture, two important considerations move Storer to the submission of this letter. First, it would be psychologically unfortunate to the cause of UHF development generally if Storer were to reactivate WGBS-TV now, and then be forced to suspend operations again upon grant of the Channel 5 or 6 applications. Second, WGBS-TV's construction acti-

vities have reached the stage of staff personnel selection. As indicated, a General Manager has been selected (from Toledo); in turn, he has conducted interviews for other staff positions. These and other prospective personnel should not be asked to disrupt their own and their families' lives without a reasonably clear view of what lies ahead.

For all of the above reasons, this will advise the Commission that, pending final action on the Channel 5 and 6 applications described above, Storer Broadcasting Company has suspended its activities looking toward reactivation of Station WGBS-TV.

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2. Exhibit No. 1 to Application for Storer for Consent to Assignment of Construction Permit to Coastal Broadcasting System, Inc. (BAPCT-407, filed with the Commission on June 30, 1967).

EXHIBIT NO. 1

FCC Form 314  
Section I, Para. 3  
Storer Broadcasting Company

ASSIGNOR'S REASONS FOR  
REQUESTING ASSIGNMENT

Storer Broadcasting Company operated Station WGBS-TV approximately two and one-half years from 1954 until April 1957, when it suspended operations after suffering operating losses of over \$500,000.00. The efforts which Storer devoted toward UHF in those years are outlined in its April 1, 1957 letter request for authority to suspend operation. In the May 13, 1965 oral proceeding on idle UHF permits, Storer advised that it would reactivate WGBS-TV if existing competitive conditions were maintained in the market (Dockets 15889 et al., Tr. 132). Simultaneously Storer applied for, and was later granted, modification of the WGBS-TV permit to specify custom-designed directional antenna facilities (BMPCT-6106, granted July 22, 1965).

Looking toward reactivation, Storer re-acquired the tower, transmitter building and land formerly used by WGBS-TV, secured and partially installed the new transmitter, ordered the directional antenna, repaired and repainted the tower, and commenced studio design and personnel selection.

While Storer was pursuing this reactivation activity, certain channel reallocations and modification proposals by existing area VHF stations and permittees altered the Miami competitive situation, and, for reasons stated in its May 12, 1966 letter to the Commission, Storer advised that it was suspending further reactivation activity pending resolution of the VHF modification proposals.

Two later developments have resulted in the filing of this assignment application. First, Storer acquired a Boston UHF station in August of 1966 (WSBK-TV, Channel 38), a station which is requiring the expenditure of substantial time, attention and resources in an attempt to achieve acceptance and avoid continuation of present substantial losses in the Boston market. Second, a prospective WGBS-TV purchaser was located who is willing and able to put the station back on the air. In these circumstances Storer concluded that the overall public interest would be served by assigning the WGBS-TV permit to the assignee, even though the purchase price is substantially below the out-of-pocket costs incurred by Storer in connection with the station's construction and operation. In this manner WGBS-TV will resume operations at an earlier date, under management which Storer believes qualified to operate in the public interest, while Storer concentrates its immediate UHF efforts on the development of its Boston station. To assist the proposed purchaser in reactivating WGBS-TV, Storer has agreed in the contract of sale to complete construction of the station pursuant to the construction permit, modified to increase the effective radiated power. Storer has reinstituted its efforts to construct the station, has ordered the antenna modification required to permit an increase in effective radiated power, and has taken other steps to obtain

certain equipment and material needed to complete construction. Installation of the modified antenna, of course, is dependent upon Commission grant of an application of modification of permit which is in process of preparation.

It is Storer's intention to acquire an additional UHF station as soon as circumstances of availability and potential combine to permit the type of programming effort which Storer stations are accustomed to provide. In the meantime, it is believed that the public interest in additional service would benefit from approval of the instant proposed assignment.